

1-1-1983

## CONFLICTS OF INTEREST IN REAL ESTATE TRANSACTIONS: DUAL REPRESENTATION—LAWYERS STRETCHING THE RULES

Gail S. Shaulys

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

---

### Recommended Citation

Gail S. Shaulys, *CONFLICTS OF INTEREST IN REAL ESTATE TRANSACTIONS: DUAL REPRESENTATION—LAWYERS STRETCHING THE RULES*, 6 W. New Eng. L. Rev. 73 (1983), <http://digitalcommons.law.wne.edu/lawreview/vol6/iss1/3>

This Comment is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact [pnewcombe@law.wne.edu](mailto:pnewcombe@law.wne.edu).

# COMMENT

## CONFLICTS OF INTEREST IN REAL ESTATE TRANSACTIONS: DUAL REPRESENTATION — LAWYERS STRETCHING THE RULES

### I. INTRODUCTION

In many real estate transactions only one attorney is retained and acts for all parties.<sup>1</sup> When this occurs, there is a good chance that at least one client will not receive full representation.<sup>2</sup> Dual representation<sup>3</sup> is virtually always improper in real estate transactions because of the very high probability that conflicts of interest will develop.<sup>4</sup> When one client's gain results in the other's loss, an attorney has usually breached his duty of undivided loyalty if he acts

---

1. According to an American Bar Foundation study, in the estimated 5.5 million residential purchases made every year, there is only a 40% probability that the purchaser will consult a lawyer. Curran, *Survey of the Public's Legal Needs*, 64 A.B.A. J. 848, 850 (1978). In New England and the states on the eastern seaboard, the usual form of closing is one "at which all of the interested parties gather to execute and exchange the necessary documents. Such a closing is usually attended by the buyer, the seller, any broker involved, a representative of the title insurer, if any, and the lawyers, if any, for buyer and seller." P. BARRON, *FEDERAL REGULATION OF REAL ESTATE, THE REAL ESTATE SETTLEMENT PROCEDURES ACT* 4 (1975). A second form of closing is used in states like California where the parties do not gather for the closing. Instead, an individual referred to as an escrow officer collects all the necessary signed documents and payments. Then, title or escrow is closed, and, after the documents are recorded, all the funds are transmitted to the parties by the escrow officer. *Id.* at 5. This comment is limited to a discussion of the closings of the first type. No attempt is made to address the policies or practices of the second.

2. The term "client" is used loosely here because when the services of an attorney are solicited or paid for by his primary client, the other party or parties to the transaction are really "quasi-clients or derivative clients," persons to whom the lawyer owes a duty secondary to that of his primary client.

3. As used herein, "dual representation" means one attorney acting for more than one party.

4. See *In re Kamp*, 40 N.J. 588, 595, 194 A.2d 236, 240 (1963). "A conflict of interest exists whenever the attorney, or any person represented by the attorney, has interests adverse in any way to the advice or course of action which should be available to the present client." Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 809 (1977).

for both.<sup>5</sup>

Until the recent adoption by the American Bar Association (ABA) of the Model Rules of Professional Conduct (Model Rules), the Model Code of Professional Responsibility (Code)<sup>6</sup> had been the body of rules to which bar associations patterned their codes of ethics. The Model Rules will now be proposed for adoption by the state bar associations and state courts that will regulate legal ethics. During this transition period, any understanding of the problems associated with conflict of interest must begin with an examination of the Code and the body of law that has been generated by its influence.

The Code mandates that a lawyer decline employment if his independent professional judgment on behalf of a client will be or is likely to be adversely affected, or if it would involve him in representing differing interests.<sup>7</sup> Another section of the Code,<sup>8</sup> however,

---

5. "When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and champion." *Grievance Comm. v. Rottner*, 152 Conn. 59, 65, 208 A.2d 82, 84 (1964).

6. On August 12, 1969, the House of Delegates of the American Bar Association adopted the Code of Professional Responsibility. T. MORGAN & R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 2 (1976). This document sets forth the rules by which lawyers should perform their profession. It consists of three separate but interrelated parts: Canons, Ethical Considerations and Disciplinary Rules.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers . . . . The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the professions should strive . . . . The Disciplinary Rules . . . are mandatory in character . . . . [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as CODE] Preamble and Preliminary Statement (1980). The Code has been adopted, sometimes with amendments, in most of the states.

7. Disciplinary Rule 5-105(A) reads:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

CODE DR 5-105(A) (footnotes omitted). DR-105(B) provides:

A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

CODE DR 5-105(B) (footnotes omitted).

8. Disciplinary Rule 5-105(C) reads:

In the situations covered by DR 5-105(A) and (B), a lawyer may represent mul-

allows dual representation if the attorney can adequately represent each client and if the clients, after full disclosure of the effect of such representation, consent. Consequently, this leaves the choice for dual representation on the conscience of the attorney since a client will probably consent to whatever the attorney suggests.

For some unexplained reason, the code sections that allow dual representation presume that a client will be satisfied with a reduced level of representation, instead of the zealous representation called for in still another Code section.<sup>9</sup> These inconsistencies have left the legal profession without guidance and the public unprotected. A party to a real estate transaction has a right to full representation. Anything less is a disservice to the client and a mere pretense by the profession.

Proponents of the single-attorney transaction argue that independent representation of potentially conflicting interests will result in duplication of effort and greater expense to individual clients with little consequent benefit.<sup>10</sup> The purchase or mortgage of a home, however, is likely to be one of the most expensive investments a person will make in a lifetime. "[T]o permit the representation of conflicting interests in the name of efficiency or economic necessity"<sup>11</sup> is an unnecessary risk that no client should be encouraged to take. This comment will demonstrate the need for a *per se* rule forbidding dual representation in real estate transactions.

## II. PROFESSIONAL RESPONSIBILITY

The ABA is opposed to one lawyer advising all parties in a real

---

multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

CODE DR 5-105(C) (footnotes omitted).

9. Canon 7: "A lawyer should represent a client zealously within the bounds of the law." CODE CANON 7. Disciplinary Rule 7-104(A) mandates that:

During the course of his representation of a client a lawyer shall not: . . .

(2) [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

CODE DR 7-104(A) (footnotes omitted).

10. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 728 (1977). See also Comment, *Conflicts of Interests in the Legal Profession*, 94 HARV. L. REV. 1244, 1303-04 (1981).

11. Annot., 68 A.L.R.3d 967, 970 (1976). See also *In re Dolan*, 76 N.J. 1, 18-19, 384 A.2d 1076, 1084-85 (1978) (Pashman, J., concurring & dissenting).

estate transaction.<sup>12</sup> Despite this opposition, the Code, promulgated by the House of Delegates of the ABA,<sup>13</sup> allows dual representation under certain circumstances.<sup>14</sup> For the most part, state codes of ethics are identical copies of the ABA Code.<sup>15</sup> Thus it follows that, in many states, a single lawyer, acting within the authority of his state code, will be the sole attorney at a closing.

According to Disciplinary Rule 5-105(c), a lawyer may represent multiple clients if it is "obvious" that he can "adequately" represent the interest of each client, and if each "consents" after "full disclosure" of the possible effect of such representation on the exercise of the attorney's independent professional judgment.<sup>16</sup> A close scrutiny of this section of the Code, however, will reveal its many pitfalls.

### A. *The Obvious Requirement*

Imagine that there is an ideal real estate transaction in progress. The parties have already fixed the terms of their agreement firmly in the contract of sale which leaves no issue unresolved.<sup>17</sup> Neither the buyer nor the seller has had any previous connection with the attorney. Each client has chosen Attorney *X* to represent his interests without pressure from some third party. From all outward appearances, Attorney *X* should feel relatively comfortable about handling the transaction for both parties. In a word, it is "obvious" that he can adequately represent both of them. All that remains is for the attorney to carry out the routine mechanical functions of a clerk.<sup>18</sup>

---

12. SPECIAL COMMITTEE ON RESIDENTIAL REAL ESTATE TRANSACTIONS, AMERICAN BAR ASSOCIATION, THE LAWYER'S PROPER ROLE—SERVICES—COMPENSATION (1978) (a position paper authorized to be published by the House of Delegates of the ABA on August 9, 1978).

13. *See supra* note 6.

14. *See supra* note 8.

15. No state has adopted an ethics code more restrictive in this area than the ABA Code. New Jersey, however, has sought to limit the circumstances governing dual representation, conflict of interest, full disclosure and informed consent. *See In re Dolan* 76 N.J. 1, 384 A.2d 1076 (1978), incorporated by reference in N.J. Supreme Court Advisory Comm. on Professional Ethics, Op. 398 (1979).

16. *See supra* note 8.

17. In practice this is very unlikely. If the contract is prepared by a broker, it is likely to contain very few protective provisions because the broker does not want to raise any issues that could create tension between the parties. The role of the broker as drafter of the sales contract is discussed later in this comment. *See infra* notes 70-74 and accompanying text. If the parties make their own contract, the probability that it will contain conflicting provisions is great. A little knowledge is sometimes a dangerous thing. Of course, few sales contracts can anticipate all the potential problems that may arise.

18. This is essentially what happens when the attorney acts as a scrivener, a prac-

Should a problem arise, however, for instance relating to the search of title, removal of an existing tenant, discovery of a water problem in the basement or termites in the woodwork, then the line defining what is obvious becomes somewhat blurred.<sup>19</sup> Under such circumstances, the attorney would be expected to withdraw from representing these differing interests.<sup>20</sup> To do otherwise would be to breach his duty of loyalty to one or the other client. How, then, are the parties to resolve their conflict? Attorney *X* is left with no choice but to advise the parties to seek separate counsel in order to assure them of adequate representation.<sup>21</sup>

### B. *The Full Disclosure Requirement*

When an attorney seeks to represent more than one client in a real estate transaction, he cannot do so unless each party consents to the dual representation. Such consent may be made only after full disclosure is made by the attorney of the possible effect of such representation on the exercise of the attorney's independent judgment.<sup>22</sup> This raises the question of what is full disclosure. If the attorney elicits full communication from each client, full disclosure is impossible because he must observe a duty of confidentiality<sup>23</sup> to both.

---

tice followed in this country that developed but was abandoned in Great Britain. "A scrivener was a tradesman who arranged loans and prepared the securities which evidenced and supported them . . . . H. KIRK, *PORTRAIT OF A PROFESSION* 127 (1976).

19. Alter the facts and imagine the pressure on an attorney to complete the transaction if he had a relationship with the broker who referred the sale; or the home sold had been constructed recently by the seller, a long-standing client; or attorney *X* had been on the board of directors of the lending institution that had arranged the sweetheart mortgage for the buyer.

20. "If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially . . . ." CODE EC 5-15. *See also In re Lanza* 65 N.J. 347, 350-52, 322 A.2d 445, 447 (1974).

21. An attorney who represents a buyer and seller in a real estate transaction may not continue to represent either party after a controversy has arisen between the clients, even though he had advised both clients prior to the controversy of the inherent problems of dual representation and received their consent. N.J. Supreme Court Advisory Comm. on Professional Ethics, Op. 212 (1971) *reprinted in* O. MARU, *infra* note 33, at 285 (1975 Supp.).

22. Disciplinary Rule 5-105(C) places the burden of disclosure on the attorney. CODE DR 5-105(C). Some attorneys have sought to evidence their disclosure and the client's subsequent consent by having the client acknowledge receipt on a written consent and waiver form. *See In re Dolan* 76 N.J. 1, 6, 11, 384 A.2d 1076, 1078, 1081 (1978).

23. Disciplinary Rule 4-101(A) reads:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the

The Code, therefore, must mean something other than the full disclosure described in Disciplinary Rule 5-105(C).<sup>24</sup> The disclosure must be sufficiently limited in scope to protect the clients' confidence yet full enough to satisfy the interests of the parties.<sup>25</sup> This is nothing less than an impossible task. Any knowledge that the attorney might have which would materially jeopardize the interests of one party over the other, obviously, cannot be exposed.

### C. *The Consent Requirement*

Any valid consent by a client can only be granted after full disclosure. To the extent that the disclosure is limited, the consent is necessarily tainted. Even assuming full disclosure, "[t]he reality . . . is that it is well-nigh impossible for the . . . client to be so well attuned to the numerous legal nuances of the transaction that his consent can be said to [be] . . . truly informed."<sup>26</sup> When the consent is induced by a promise by the attorney that the client will be adequately represented, it is doubtful that such consent will be valid.<sup>27</sup> In addition, any last minute waiver and consent forms signed at the closing table would be insufficient to satisfy the informed consent requirement. This would preclude the client from having any real choice, particularly considering the pressures he might feel as a potential homeowner to conclude the transaction.

### D. *The Adequate Representation Requirement*

No term within Disciplinary Rule 5-105(C) is more elusive than

---

disclosure of which would be embarrassing or would be likely to be detrimental to the client.

CODE DR 4-101(A). Disciplinary Rule 4-101(B) states:

Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client. (2) Use a confidence or secret of his client to the disadvantage of the client. (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

CODE DR 4-101(B) (footnotes omitted).

24. *See supra* note 8.

25. Full disclosure requires that the attorney reveal secrets and confidences that he has learned from each client. The test of relevance to the other client is whether knowledge of the secret will materially affect the position or decisions of the other client. If it will, then it must be shared. Such a practice, of course, cannot be followed. The revelation of what the attorney knows will cause many deals to fall apart. Thus, it follows that an attorney should protect his client's confidences and secrets and admit to the necessity of separate representation.

26. *In re Dolan* 76 N.J. 1, 14-15, 384 A.2d 1076, 1083-84 (1978) (Pashman, J., concurring & dissenting).

27. *Id.* at 15, 384 A.2d at 1083.

the adequate representation requirement. A lawyer's professional responsibility must begin and end with concern for his client. When there is more than one client to whom he may have a professional duty, the problem becomes more complex. At that point, there are at least two questions that an attorney must ask himself immediately: Who is my client, and what are the services that I must perform for him?<sup>28</sup> The Code provides little guidance and much confusion in this regard.<sup>29</sup> "Client identity is ambiguous . . . and requires resolution by conscious choice."<sup>30</sup>

When two parties are represented by one attorney, usually one client is the primary client while the other is the derivative or quasi-client. The primary client is someone with whom the attorney already has an existing attorney-client relationship, while the derivative client first comes in contact with the attorney as the result of the transaction itself.<sup>31</sup> Because at least one party to the transaction, whether it be the broker, lender, seller, insurer or buyer, has an existing relationship with the attorney, the choice for dual representation is the natural consequence of someone's influence. The problem of lawyer referral in real estate transactions has been addressed in the Code<sup>32</sup> and in numerous ethics opinions issued by state bar associations.<sup>33</sup> The lawyer acting alone has a responsibility to both

---

28. Decisions to represent more than one client are typically not made with any degree of soul-searching. Either the attorney regularly represents more than one client or he does not. Often, he will not even meet the other client until the day of the closing.

29. Nowhere in the Code does it specify a procedure to identify a client. It presumes that client identity will always be apparent. Canon 7 requires that the client receive the attorney's zealous representation. One must presume, therefore, that all others must be held at arm's length. Yet, DR 5-105(C) allows multiple representation. For a provocative discussion of inhibited representation see G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 36-38 (1978).

30. *Id.* at 43-45.

31. From the very beginning, when a buyer and seller, borrower and lender or broker come together to formulate a transaction, the potential for lawyer referral is always present. "Often the parties themselves will initiate and readily consent to joint representation to reduce costs." Aronson, *supra* note 4, at 814.

32. Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment.

CODE EC 2-8.

33. See generally O. MARU, *DIGEST OF BAR ASSOCIATION ETHICS OPINIONS* (1970 & Supps. 1975 & 1980). Mr. Maru has compiled ethics opinions from many state and local bar associations. The Digest is supported and administered by the ABA. It includes only formal opinions of the ABA and state and local member associations represented in the House of Delegates of the ABA. Unless otherwise indicated, the opinions



clients in a real estate transaction. It is clear, however, that when one party is a primary client, the responsibility to each will not be the same.<sup>34</sup>

To overcome this imbalance, some members of the bar have sought to limit the scope of their representation of the derivative client. The Supreme Court of New Jersey sanctioned the concept of limited dual representation in *In re Kamp*.<sup>35</sup> The court held that full disclosure required that the attorney inform the buyer of his relationship with the seller and of the limited scope of his intended representation of the buyer's interests.<sup>36</sup> Aside from seeing that closing documents are properly executed and recorded and that funds are

---

hereinafter referred to appear in one of the three Maru publications. See Ill. State Bar Ass'n Comm. on Professional Ethics, Formal Op. 598 (1978), *reprinted in* O. MARU, *supra*, at 169 (1980 Supp.); Mass. Bar Ass'n Comm. on Professional Ethics, Formal Op. 76-10 (1976), *reprinted in* O. MARU, *supra*, at 260-61 (1980 Supp.); N.C. State Bar Council Ethics Comm., Formal Ops. CPR-103 (1977), 113 (1953), *reprinted in* O. MARU, *supra*, at 450 (1980 Supp.), 349 (1970); Or. State Bar Comm. on Legal Ethics, Formal Ops. 371 (1977), 118, 102 (1962), *reprinted in* O. MARU, *supra*, at 505 (1980 Supp.); Va. State Bar Council, Formal Ops. 169 (1971) 114 (1962), 66 (1955), *reprinted in* O. MARU, *supra*, at 472 (1975 Supp.), 491, 485 (1970); ABA Comm. on Professional Ethics, Informal Ops., 366 (1975), 775 (1965). For opinions involving referrals by builders or developers, see Md. State Bar Ass'n Comm. on Ethics, Formal Op. 108 (1974), *reprinted in* O. MARU, *supra*, at 248 (1975 Supp.); N.J. Supreme Court Advisory Comm. on Professional Ethics, Formal Ops. 51 (1964), 27 (n.d.), 13 (n.d.), *reprinted in* O. MARU, *supra*, at 177, 175, 174 (1970); N.Y. State Bar Ass'n Comm. on Professional Ethics, Formal Op. 848 (1960), *reprinted in* O. MARU, *supra*, at 337 (1970); N.C. State Bar Council Ethics Comm., Formal Ops. CPR-56 (1975), 820 (1973), 624 (1968), 114, 113 (1953); *reprinted in* O. MARU, *supra*, at 442 (1980 Supp.), 417, 393 (1975 Supp.), 349 (1970); Va. State Bar Council, Formal Ops. 114 (1962), 66 (1955), Informal Op. 18 (n.d.), *reprinted in* O. MARU, *supra*, at 491, 485 (1970), 474 (1975 Supp.); ABA Comm. on Ethics and Responsibility, Informal Ops. 1261 (1973), 886 (1965).

34. It would be erroneous to assume that a lawyer who has had a regular attorney-client relationship with a primary client would be willing or able to set aside that allegiance in order to protect both clients fully. Further,

this two-fold obligation cannot be met in circumstances where the attorney's knowledge embraces any fact, known to him as the result of his relationship with the [primary client] which, if known to the [derivative client], . . . might influence him to reject the [transaction] or to insist upon terms or conditions less favorable to the [primary client].

*In re Dolan* 76 N.J. 1, 16, 384 A.2d 1076, 1084 (1978) (Pashman, J., concurring & dissenting) (citing N.J. Supreme Court Advisory Comm. on Professional Ethics Op. 51, *reprinted in* 87 N.J.L.J. 705 (1964)).

35. 40 N.J. 588, 597, 194 A.2d 236, 240 (1963).

36. What is so ambiguous about the *Kamp* decision is that the court looked with disdain upon the limited scope of *Kamp*'s retainer. To handle the title work only, the majority said, was to perform as if he had a contract for the sale of a commodity. "Such an attitude places the practice of law in a commercial atmosphere which is wholly foreign to the fundamental premise upon which the Canons of Professional Ethics are based, i.e., that the practice of law is a profession and not a business." *Id.*, 194 A.2d at 241.

disbursed, the attorney who acts for a primary client cannot realistically serve in an advisory capacity to a derivative client.

The practice of limiting representation has been around for as long as the profession itself, and attorneys may establish the scope of their employment by contract.<sup>37</sup> In *Blevin v. Mayfield*<sup>38</sup> a California appellate court indicated that in situations in which clients come to an attorney's office having already reached an agreement as to the terms of a transaction, the attorney may properly act as a scrivener in drawing the deed. In *Blevin*, the attorney's prior relationship with both parties was held not to be a sufficient conflict of interest to compel a reversal.<sup>39</sup>

The role of the scrivener, however, is not without its limitations. Rarely are all of the terms of an agreement clearly formulated before a closing. In keeping with the true role of a scrivener, the attorney should not make suggestions to either party about the provisions of the deed. The placement of a crucial clause in a mortgage note or deed can make a significant difference to each party.<sup>40</sup> Examples are questions of whether the borrower can prepay the debt without penalty and who will bear the burden of fire protection while the home is under construction.<sup>41</sup> It is not realistic to suggest that all these

---

37. An agreement limiting the scope of representation must be in accord with the rules of professional responsibility. The client should not be asked to agree to representation so limited in scope that it would violate the attorney's duty to provide competent representation. Rule 1.2 comment, Services Limited to Particular Purposes. See also Annot., 94 A.L.R. 1305 (1981). The proper handling of a particular matter should include an inquiry into all facts and elements that would have legal consequences for the client, and recommendations of what the lawyer believes to be the optimal course of action for the client.

38. 189 Cal. App.2d 649, 11 Cal. Rptr. 882 (1961).

39. *Id.* at 652, 11 Cal. Rptr. at 884.

40. That is exactly what the Florida Supreme Court stated in *Florida Bar v. Teitelman*, 261 So.2d 140, 143 (Fla. 1972).

The suggestion that it is merely a 'scrivener's' task borders on the presumptuous. In the completion of legal forms it is what may be left out as well as that included which can be a very serious consequence. The advice essential to the completion of such documents . . . requires one skilled in the law for a proper completion of such matters . . .

*Id.*

41. The drafting of . . . instruments is sometimes considered merely routine work. This is not true. For example, the description of the parties must be so phrased as to prevent confusion, and the description of the land must be complete and accurate. The importance of the form of warranties is often overlooked. . . . Of equal importance are other special agreements reached earlier in the transaction. The controlling law may provide that the deed supersedes prior understandings so that if they are not embraced in the deed they are nullified. Each deed must therefore be examined to determine whether it carries out what has been agreed upon.

See *supra* note 12, at 7.

terms will be predetermined by contract.<sup>42</sup> Attorneys who act under the guise of scriveners or mere mechanics during the course of dual representation are limiting the scope of their employment to a standard below that necessary for reasonable or adequate representation.

Whether the above is a description of the adequate representation referred to in Disciplinary Rule 5-105(C) is unknown. One other section of the Code states that "[w]hether a lawyer can fairly and adequately protect the interests of multiple clients . . . depends upon an analysis of each case."<sup>43</sup> The real test should be whether an attorney's evaluation of all facts and circumstances surrounding the transaction would permit him to make compatible recommendations beneficial to each client.<sup>44</sup> If he cannot, then the representation he provides should not be considered adequate, and each client would be better served by his own attorney.

### III. THE CONFLICT OF INTEREST SITUATION

In the typical real estate transaction, there may be several different parties whose interests are adverse and represent potential conflicts. The purpose of this section is to point out the most common conflict areas. Part A addresses the conflicts that are present in the attorney's simultaneous representation of multiple clients. Part B focuses on the attorney's personal and financial conflicts of interest with his client. The relationship of attorneys with title insurance companies is examined in Part C.

#### A. *Simultaneous Representation*

##### 1. Buyer-seller Conflicts

In a real estate transaction, the positions of seller and buyer are inherently susceptible to conflict.<sup>45</sup> This is particularly true when the attorney has a long standing relationship with one party.<sup>46</sup> An obvious conflict of interest is present when an attorney acts for the seller-developer in the sale of homes in a subdivision, and the buyers also

---

42. The role of the attorney as drafter of the contract is discussed later in this comment. See *infra* note 71 and accompanying text. See also text accompanying note 250.

43. CODE EC 5-17.

44. The test must be an objective one. If another attorney were acting separately for the client, the questions should be whether he would make the same recommendations, point out the same facts and argue for the same protections.

45. 40 N.J. at 595, 194 A.2d at 240.

46. *In re Dolan*, 76 N.J. 1,, 13-21, 384 A.2d 1076, 1082-86 (1978) (Pashman, J., concurring & dissenting).

rely on that same attorney to represent their interests. A New Jersey decision, *In re Dolan*,<sup>47</sup> demonstrates this point. One attorney represented the seller, the purchaser-mortgagor, and the mortgagee. Attorney Dolan had been successful in arranging the financing through a New Jersey mortgage company for the seller-developer's construction loans as well as the permanent financing for the buyers of the townhouses.<sup>48</sup> The seller marketed the units through a real estate agent whose contract contained a provision which stated that "[i]f the purchaser uses the seller's attorney, the seller will pay the legal fee for title examination, recording of deed, mortgage survey, mortgage title insurance, appraisal and inspection fees."<sup>49</sup>

Dolan (or his associate) regularly attended closings in which he acted for the seller, purchaser, and the lender. At these closings the purchasers were notified for the first time of the potential conflicts of interest and were presented with consent forms requiring their acknowledgment of the simultaneous representation.<sup>50</sup> Mindful of the potential conflict, the court turned its attention to the consent forms. "[I]f any conflicting interest could arise which would stand in the way of . . . unstinting zeal, then the client must be informed and the attorney may continue his limited representation only with the client's informed consent."<sup>51</sup> Because of the circumstances surrounding the execution of the consent forms, Dolan received a public reprimand.<sup>52</sup>

In his concurring and dissenting opinion, Judge Pashman<sup>53</sup> presented an accurate description of the conflicts existing in similar circumstances.

Any conflicting interests which are potentially disruptive of the ultimate goal—the expeditious consummation of the sales transaction—must inevitably be resolved in favor of the primary client and for that same reason will probably not even be brought to the attention of the derivative client. This problem is even more aggravated in circumstances . . . where the primary client of the attorney is a developer with whom the attorney has a potentially long-term and profitable relationship. Consequently, the attorney has a substantial economic stake in maintaining the continued

---

47. *Id.* at 1, 384 A.2d at 1076.

48. *Id.* at 4, 384 A.2d at 1077.

49. *Id.* at 5, 384 A.2d at 1078.

50. *Id.* at 6, 384 A.2d at 1078.

51. *Id.* at 9, 384 A.2d at 1080.

52. *Id.* at 13, 384 A.2d at 1082.

53. *Id.* at 13-21, 384 A.2d at 1082-86.

goodwill of this primary client.<sup>54</sup>

While the potential for conflicts between buyers and sellers is not limited to new home construction, the incidences of dual representation are more prevalent in circumstances where a seller is in a position to offer a "package deal," an arrangement in which the seller picks up most of the buyer's expenses.<sup>55</sup> This, of course, is more likely to happen when a seller has more than one unit to sell, whether it be old or new. Even when the attorney and seller are relatively unsophisticated and come together for a single transaction, the potential for conflict is not absent. The problems that can develop are limitless and the need for separate counsel is important in every sale of real estate.

## 2. Borrower-lender Conflicts

It is a common misconception on the part of borrowers that lenders have such similar interests that there will be no impropriety if an attorney represents both parties.<sup>56</sup> It is true that both are con-

---

54. *Id.* at 15-16, 384 A.2d at 1083. Among the potential areas of controversy outlined by Judge Pashman are the following:

A) Difficulties with the quality of title deliverable by the seller; B) Disputes over alleged structural defects; C) Warranties; D) Unfinished work; E) Leaks; F) Cellar problems; G) Construction of roads and sidewalks in the development on schedule; H) Drainage problems; I) Problems as to utilities; J) Defective masonry foundations; K) Mortgage and tax escrow—amount and interest; L) Escrows of a part of seller's money to assure compliance with above problems, including schedule for release of funds; M) Appropriate remedies for compliance with any agreements concerning the above.

*Id.* at 15, 384 A.2d at 1083.

55. In the usual package deal the seller-developer picks up most or all of the buyer's legal fees as well as other expenses, such as title insurance premium recording fees and bank points. The offer by the seller to bear these costs is made at the time the contract is signed. Thus it is an obvious incentive to get the buyer to sign the contract of sale. Surely these additional expenses of the seller are built into the contract price.

56. Numerous state bar associations have issued opinions relating to attorneys acting for borrowers and lenders simultaneously. *See generally* O. MARU, *supra* note 33. *See also* Colo. Bar Ass'n Ethics Comm., Formal Ops. 51, 29 (1964), *reprinted in* O. MARU, *supra* note 33, at 77 (1970); Fla. Bar Comm. on Professional Ethics, Formal Op. 64-58 (1965), *reprinted in* O. MARU, *supra* note 33, at 100 (1970); Ill. State Bar Ass'n Comm. on Professional Ethics, Formal Op. 644 (1980); Me. State Bar Ass'n, Formal Op. 12 (1980); Advisory Comm. of the Neb. State Bar Ass'n, Formal Op. 77-1 (1977), *reprinted in* O. MARU, *supra* note 33, at 379 (1980 Supp.); N.J. Supreme Court Advisory Comm. on Professional Ethics, Formal Ops. 243 (1972), 51 (n.d.), *reprinted in* O. MARU, *supra* note 33, at 293 (1975 Supp.), 177 (1970); N.Y. State Bar Ass'n Comm. on Professional Ethics, Formal Op. 438 (1976), 350 (1974), *reprinted in* O. MARU, *supra* note 33, at 415 (1980 Supp.), 347 (1975 Supp.); W.Va. State Bar Legal Ethics Comm., Formal Op. 78-9 (1978), *reprinted in* O. MARU, *supra* note 33, at 588 (1980 Supp.); *See also* ABA Comm. on Professional Ethics, Informal Op. 1004 (1967), 837 (1965), 582 (1962). The

cerned with a few similar aspects of the transaction: the marketability of title; the necessity for fire insurance protection; and the payment of real estate taxes. The borrower's interest stems from his need to possess the property, the lender's, from the possibility it might have to foreclose.

There are other aspects of the borrower-lender relationship, however, that are less compatible. The borrower wants to keep all costs to a minimum while the lender is in business to make a substantial profit through interest payments and fees. The points, or fee, charged by the lender for making the loan, the interest rate, as well as the terms of the loan are all areas of possible contention. The lender would prefer an acceleration clause in the note to permit the lender to demand full payment if the borrower defaulted under a provision of the loan. At the same time, the borrower would prefer to prepay the loan without penalty if his circumstances changed during the loan period.<sup>57</sup> There are numerous other provisions in the loan agreement which, by their nature, burden one party and benefit the other. Furthermore, terms offered for second mortgages may be more demanding, and perhaps more competitive, among lenders.

Additionally, it is not unusual for attorneys to have alliances or business connections with certain lenders.<sup>58</sup> An unwary borrower, relying upon a lawyer's biased advice, can be trapped into believing that all loan options are the same. A borrower should have independent counsel at the time of the loan application and later at closing.<sup>59</sup> Attorneys should not be permitted to arrange mortgage financing for their clients when they have an economic tie to the lender.

A case which clearly illustrates the conflicts present in the borrower-lender situation is *Crest Investment Trust, Inc. v. Comstock*.<sup>60</sup> The Comstocks brought suit to enjoin a foreclosure of their farm and to set aside a mortgage. Crest was a commercial banking institution specializing in providing funds for small businesses. Its general counsel and chief executive officer was Sidney Kaplan, the appellant. After a period of negotiations, Crest entered into a loan agreement

---

practice is generally allowed. If foreclosure ensues, however, the general rule is that the attorney cannot act for either party.

57. See *supra* note 12, at 10-11.

58. *Id.* at 10. Bar associations have found it ethical for an attorney serving on a board of directors of a lending institution to handle loan closings for borrowers. See, e.g., N.C. State Bar Council Ethics Comm., Op. CPR-204 (1979). See generally O. MARU, *supra* note 33, at 466 (1980 Supp.).

59. See *supra* note 12, at 4.

60. 23 Md. App. 280, 327 A.2d 891 (1974), *cert. denied*, 274 Md. 726 (1975).

with the Comstocks which was prepared by Kaplan, who was designated in the instrument as attorney for all parties. Kaplan had discouraged the borrowers from obtaining their own counsel for the transaction. Subsequent to the execution of the loan agreement and after it had become apparent that the Comstocks could not complete their bargain, the parties sought to modify the terms of the mortgage.<sup>61</sup> The net result of the modification was that an adjoining parcel owned by the Comstocks was conveyed to Crest as additional consideration for the extension of the loan.<sup>62</sup>

At trial, "[t]he court concluded that appellant Kaplan, with the knowledge of his client, Crest, failed to discharge adequately his duty to the Comstocks . . ."<sup>63</sup> and that the attempted foreclosure of the property should be permanently enjoined.<sup>64</sup>

On appeal, Kaplan argued that the lower court had erred in finding the existence of an attorney-client relationship between himself and the borrowers: Kaplan contended that there was, in fact, no fiduciary relationship but that it had been a straight business transaction.<sup>65</sup> The trial court found, based upon the numerous occasions the borrowers were dissuaded from seeking independent legal advice and the fact that they always had been assured that appellant Kaplan was acting on their behalf, that an attorney-client relationship existed.<sup>66</sup> Thus, the borrowers "depended on Mr. Kaplan for his advice and looked to his knowledge . . ."<sup>67</sup>

Citing authority from other states, the appellate court found that an attorney-client relationship may be implied from the conduct of the parties and does not depend, unless the parties so specify, upon the payment of a fee or the execution of a formal contract.<sup>68</sup> The court further stated that "when an attorney undertakes dual representation without making the full disclosure required of him, he incurs the risk of civil liability to the client who suffers loss caused by such lack of disclosure."<sup>69</sup>

---

61. *Id.* at 287, 327 A.2d at 896.

62. *Id.* at 288, 327 A.2d at 897.

63. *Id.* at 292, 327 A.2d at 899.

64. *Id.* at 292, 327 A.2d at 900.

65. *Id.* at 294, 327 A.2d at 901.

66. *Id.* at 295, 327 A.2d at 901.

67. *Id.*

68. *Id.* at 296-97, 327 A.2d at 902.

69. *Id.* at 302, 327 A.2d at 904.

### 3. Real Estate Broker Conflicts

The real estate broker plays a major role in real estate transactions throughout the country. He has the potential to control the terms of the contract and the representation of the parties.<sup>70</sup> Of primary concern to the bar is the fact that the drafting of a sales contract, which can ultimately fix the rights of the parties, is handled in a most commercial, non-legal fashion.<sup>71</sup>

When the broker has found a potential buyer, negotiations between the buyer and the seller will begin, with the broker acting in the role of intermediary. In some cases the seller will leave the broker all the work of negotiation and will merely ratify the agreement reached with the buyer.

It is generally thought that neither the buyer nor the seller needs a lawyer in the course of negotiations. . . . In fact, a great deal of trouble can be avoided if both the buyer and the seller consult their own lawyers during the course of the negotiations. If they are to make a proper bargain, they must know what to bargain about.<sup>72</sup>

When a broker is in a position to send a great deal of business to a particular attorney, common sense dictates that both the broker and the attorney have an economic interest in keeping that alliance strong. The broker relies upon the attorney to see that the transaction is completed because in most instances, until it is closed, he will

---

70. Since a broker builds up alliances with certain attorneys over a period of time, it is not unlikely that buyers and sellers will seek his advice relating to choice of counsel.

71. Lawyers rarely get an opportunity to prepare the contract of sale in the small real estate transaction. . . . [T]he lawyer usually finds the contract has been signed and the parties—particularly the real estate broker—in a hurry to close. Printed contract of sale forms published by lay organizations are used. The blank spaces are usually filled in by the seller, his broker or salesman. Legal pitfalls are not considered—perhaps not even recognized.

Blair, *The Small Real Estate Transaction—What Should We Do About It?* 7 LAW NOTES 77 (1971) (footnote omitted). California has sought to remedy part of the problem through the adoption by the state bar and the California Real Estate Association in 1967 of a form of contract that prominently displays the following warning: "A real estate broker is the person qualified to advise on real estate. If you desire legal advice consult your attorney." Whitman, *Transferring North Carolina Real Estate*, 49 N.C.L. REV. 593, 630-31 (1971).

72. See *supra* note 12, at 3-4. Prior to the time the contract is signed, the buyer and the seller should have detailed advice about many legal aspects of the transaction. Of particular importance is the issue of which party will pay the cost of services that are necessary to complete the transaction and which attorney will provide the services. Many people believe that they have little or no control over these aspects of the transaction. In fact, the contract can provide for any arrangement they desire, barring an illegal provision, of course.



not get his commission.<sup>73</sup> When the transaction looks like it may collapse, the broker relies on the attorney to smooth over the trouble. At the same time, a broker can be a major source of revenue for the attorney.<sup>74</sup> Because of this silent partnership, if one party, particularly the buyer, does not have separate counsel, the opportunity for a legal issue to surface is greatly diminished. Thus, it follows that brokers have a stake in encouraging the practice of dual representation.

### B. *Financial Conflicts with Interests of Clients*

The previous paragraphs have dealt with conflict situations in which an attorney has acted for more than one party. In this section, the discussion turns to conflicts that arise when an attorney involves his client in his own real estate ventures.

The requirement that an attorney avoid a conflict between his client's interest and his own is one that is generally accepted.<sup>75</sup> There is, however, a great temptation for an attorney to lessen his loyalty when his personal financial interests conflict with those of his client.<sup>76</sup> The Code reflects a desire to protect the attorney and the client from such an inclination. "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."<sup>77</sup>

When brought to the attention of the courts, cases involving conflicts of interest are closely scrutinized for unfairness if the attorney has benefitted from a business transaction with a client. There is

---

73. It is a common belief of many lay people that if there are two brokers involved, a co-broker arrangement in which one realtor has listed the property and another is showing the home to the buyer, that one is acting for the seller and the other for the buyer. This, of course, is not true because each receives his share of the commission from the seller and then only when the transaction is closed. Also, each will seek the highest selling price because the size of his fee depends on it.

74. Often a three-sided alliance is created. The seller-developer uses a particular broker to sell the homes at a slightly reduced rate due to the volume generated. In return, the broker steers buyers to a particular attorney who has also acted for the seller in completing the earlier zoning or construction financing. This makes a very tight arrangement. See *In re Dolan*, 76 N.J. 1, 5, 384 A.2d 1076, 1078 (1978). See also Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 GEO. L.J. 1311, 1339 (1974).

75. See *infra* text accompanying note 77.

76. Aronson, *supra* note 4, at 816. Lawyers continue to cling to the proposition that transactions between themselves and their clients "may still be proper, so long as the lawyer enters into them with suitably clean hands, and a suitably pure heart." Chodos, *Lawyer-client Deals: The End of an Era*, 48 L.A.B. BULL. 407, 410 (1973).

77. CODE DR 5-101(A) (footnote omitted) (1979).

a presumption of undue influence, fraud or overreaching that must be rebutted for the attorney to avoid discipline.<sup>78</sup> Another section of the Code<sup>79</sup> mandates that "[A] lawyer . . . shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment . . . for the protection of the client, unless the client has consented after full disclosure."<sup>80</sup> These two sections of the Code are fraught with the same ambiguities as Disciplinary Rules 5-105(A), (B) and (C). That is, the problem of the client's intelligent consent which can only follow full disclosure.<sup>81</sup> Once again, the ABA has used the magical consent and disclosure requirements to overcome the obvious lack of independent advice that a client needs when faced with such conflicts of interest. There is vagueness, of course, attached to the term "differing interests." It is hard to imagine a real estate transaction between an attorney and his client that would not have some differing interests.<sup>82</sup> The ABA Canons of Professional Ethics<sup>83</sup> speak of "conflicting interests" rather than "differing interests" but make no attempt to define them other than the statement in Canon 6: "Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his

---

78. Aronson, *supra* note 4, at 816.

79. CODE DR 5-104(A).

80. *Id.*

81. Full disclosure and informed consent will presumably satisfy the policy of the law sufficiently to overcome the presumption of fraud. But, very few transactions between lawyers and their clients would actually be closed if the lawyer provided the kind of disclosure that the law requires. When entering into a real estate transaction with an attorney, there are many facts "which the lawyer would probably advise [his client] to learn if the transaction involved only third parties." See Chodos, *supra* note 76, at 430. For instance, the client should know about the financial condition of the lawyer and any other proposed investors and whether they would be likely to pull out of the deal at the first sign of trouble. "If a dispute ultimately arises, will it work to the client's advantage that the lawyer can litigate his claims without cost, while the client must hire new counsel at a potentially vast expense . . . ?" *Id.* Obviously, the lawyer would be reluctant to articulate any uncertainties that he may have which might discourage the client from participating in the transaction. "[W]hen the lawyer expects to become a party to the transaction, his judgment must necessarily be obscured to some extent by his own interest . . . [H]is expectation of profit will make him eager to see the deal consummated, and this eagerness will color his advice . . . ." *Id.*

82. It is improper for an attorney who acts as money lender mortgagee to perform certain incidental legal services that arise in connection with the transaction. A lawyer should never represent or advise a party with respect to transactions between that party and himself. N.Y. City Bar Ass'n Formal Op. 846 (1960), O. MARU, *supra* note 33, at 336 (1970).

83. ABA CANONS OF PROFESSIONAL ETHICS CANON 6 (1908) (amended 1937). Before the Model Code of Professional Responsibility was adopted, the pronouncements of the ABA took the form of Canons.

duty to contend for that which duty to another client requires him to oppose.”<sup>84</sup> When it comes to a matter of financial benefit to the attorney, one cannot expect that he will have the ability to resolve the conflict by subordinating his own interests to those of his client.

A clear example of such a conflict is provided by a New Jersey Supreme Court case, *In re Krakauer*.<sup>85</sup> In 1974, Carlos de la Fuente and his wife purchased the assets, good will and liquor license of a restaurant. At the same time they leased a portion of the building in which the restaurant was located from Lipari, the seller of the business and the landlord of the property. Throughout these transactions respondent, Attorney Krakauer, represented only Mr. Lipari. The de la Fuentes were represented by their own counsel.<sup>86</sup>

Within the same year, a fire destroyed the restaurant premises and the de la Fuentes asked respondent to represent them in settling the fire loss as well as the reconstruction of the building. With the consent of the de la Fuentes and the insurance adjuster, respondent received one-half of the ten percent commission paid to the insurance adjuster.<sup>87</sup> To facilitate the de la Fuentes’ purchase of the property, respondent agreed to negotiate a mortgage of \$50,000 for a ten percent commission. It would be due only if the loan came from an outside source, not if it came from the seller in the way of a purchase money mortgage. Respondent retained one-third of the deposit paid by the de la Fuentes and their joint venturers as his legal fee. He also paid himself \$5,000 out of the funds received on the settlement of the fire loss which were being held in escrow for completion of the building. The \$5,000 payment represented his fee for placing the mortgage although, at that time, he had not arranged the mortgage from an outside source.<sup>88</sup>

Unknown to the de la Fuentes, respondent set up a sham corporation for the seller as lender, who had agreed to accept a \$53,000 mortgage at eighteen percent for six and one-half years. For this Lipari received a premium of \$1,500. This, too, was never revealed to the de la Fuentes who believed that the loan came from an outside corporation. In addition, respondent submitted a bill for services at the closing of \$560 for title insurance premium and title work.<sup>89</sup>

---

84. *Id.*

85. 81 N.J. 32, 404 A.2d 1137 (1979).

86. *Id.* at 35, 404 A.2d at 1138.

87. *Id.* at 36, 404 A.2d at 1139. Later, respondent testified that he performed legal services in connection with this fee. *Id.*

88. *Id.* at 37, 404 A.2d at 1139.

89. *Id.* at 37-38, 404 A.2d at 1139-40.

Following the closing, the de la Fuentes obtained new counsel who challenged several aspects of the transaction. Through independent investigation, the new attorney learned that no title search had been completed at the time of the closing and no insurance policy had been ordered, although respondent had collected the premium. Furthermore, the charter of the corporation from which the de la Fuentes had purchased the restaurant business had been forfeited in 1971, the lending corporation had been formed by respondent three days after the closing, and the corporation that had sold the real estate had forfeited its charter for nonpayment of taxes about six months before the closing.<sup>90</sup>

The court found that "in representing the de la Fuentes in connection with their purchase of the property from Lipari, respondent did not render the free and loyal representation to which a client is entitled. . . . [At the same time] respondent maintained a continuing professional relationship with Lipari and his interests."<sup>91</sup> His retention of the \$5,000 violated DR 1-102(A)(4).<sup>92</sup> Because he let his personal interests interfere with his representation of the de la Fuentes and doing so was fraudulent, respondent attorney was suspended from the practice of law for one year.<sup>93</sup>

One of the problems prevalent in this and similar cases is the issue of whether an attorney-client relationship exists at the time of the arrangement between the parties. If it can be shown to exist, then the attorney will be held to a duty of loyalty to his client and the requisite disclosure and consent requirements will come into play.<sup>94</sup>

The Supreme Court of Alabama, in the case of *Watkins v. St. Paul Fire & Marine Insurance Co.*,<sup>95</sup> held that the investment of proceeds of a settlement by an attorney at the client's request and pursu-

---

90. *Id.* at 38, 404 A.2d at 1140.

91. *Id.* at 39, 404 A.2d at 1140.

92. CODE DR 1-102(A)(4). "A lawyer shall not . . . (4) [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* (footnote omitted). Although the opinion does not mention his violation of Disciplinary Rule 5-101, "Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment," certainly Attorney Krakauer had his own financial interests in mind when he entered into the arrangement to receive a commission for settling the fire loss and placing a mortgage, not those of his clients.

93. *Id.* at 39, 404 A.2d at 1141.

94. Amended Rule 16 of the Hawaii Supreme Court applies to an attorney's acts or omissions that violate the Code of Professional Responsibility whether or not they occurred under an attorney-client relationship. Hawaii Supreme Court Disciplinary Board, Op. 75-1-1 (1975), reprinted in O. MARU, *supra* note 33, at 174 (1975 Supp.).

95. 376 So.2d 660 (Ala. 1979).

ant to a formal agreement executed when an attorney-client relationship existed, was sufficient evidence

that the parties viewed their relationship as one of attorney and client. . . . [T]herefore, it was for the jury to determine whether by execution of the investment agreement and promissory note, the relationship changed from attorney-client into some other relationship by which coverage would not lie under the terms of the . . . [attorney's liability] policy.<sup>96</sup>

It is difficult, if not impossible, to determine when an attorney-client relationship begins and ends. Consider, for example, the following scenario: An attorney specializes in conveyancing work and has several developers for whom he regularly handles zoning and closing matters. Some of them, on occasion, utilize other attorneys for subdivision work in different parts of the state. The attorney is considered to be a financial specialist and on numerous occasions the developers use his services for arranging their mortgage financing. Sometimes client *A* will be the source of mortgage for client *B*. During the course of this longstanding relationship, the attorney makes recommendations about the desirability of certain land deals, some of which he already has a financial interest in himself.<sup>97</sup> Since it is the developer's practice to consult his attorney, sometimes on a daily basis about legal matters which affect his existing business, it is hard to determine the bounds of their relationship. Should it be assumed that when the attorney is talking with the client about other land matters that it is at arm's length?<sup>98</sup> Where does one draw the line between business and legal advice? It is more likely that a certain

---

96. *Id.* at 663. In four related cases the same court held that when representing people as an investment counselor the attorney surely was acting in a fiduciary capacity to each of them and that all of them were undisputedly his clients. *Miles v. St. Paul Fire & Marine Ins. Co.* 381 So.2d 13, 14 (Ala. 1980).

97. "A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested." CODE EC 5-3.

98. The concept of an arm's-length negotiation between a lawyer and his client is a contradiction in terms. The reason that lawyers cannot conduct arm's length negotiations with their clients is that they are not at arm's length. They stand, instead, in the relationship of fiduciary and beneficiary as a matter of law, and ordinarily stand in a relation of trust and confidence as a matter of fact.

This means that the client is not on guard against imposition, as he would be if dealing with an ordinary business adversary; he is not protecting himself as he would in an ordinary business transaction; and he expects—and is entitled to expect—that his lawyer will look after his interests for him.

Chodos, *supra* note 76, at 429 (footnote omitted).

reliance develops on the client's part and that neither the attorney nor the client can discern what is legal and what is business advice.

During this contact with the client, there is a strong incentive for the attorney to encourage the client to join him or another client in one more enterprise based on the attorney's potential for large legal fees.<sup>99</sup> If the land deal should go sour, however, what recourse does the client have? He cannot ask for rescission of the transaction because he has already invested too much to pull out of the transaction and there are often too many other people involved. Because of this, not all attorney-client real estate conflicts are litigated. Without independent counsel the client is at the mercy of his attorney. The problem is magnified, of course, when the attorney involves other clients in the financing arrangements and places himself in a position to receive substantial legal fees from more than one client.<sup>100</sup>

The lawyer who wishes to engage in real estate transactions should do so with people other than his clients. If a particular business transaction is so irresistible to the attorney, then he must sever the attorney-client relationship and be certain that the client obtains independent legal advice.<sup>101</sup>

### C. *Strange Bedfellows: Attorneys and Title Companies*

An attorney occupies a high position of professional responsibility in his relationship with his client. In order to maintain that position, he must perform his duties with the utmost good faith, integrity and fidelity. "This relationship precludes the attorney from having any personal interest antagonistic to those of his client, or from obtaining any personal advantage out of the relationship, [especially] without the knowledge or consent of his client."<sup>102</sup> When an attorney becomes an agent for a commercial title insurance company<sup>103</sup>

---

99. In a fifty lot subdivision, with zoning and closing work, he stands to make almost \$50,000 in fees. He can expect to receive between \$800-1000 per unit if the seller pays the buyer's legal fees, based on Connecticut rates.

100. Such was the case in *Ames v. State Bar of Cal.*, 506 P.2d 625, 106 Cal. Rptr. 489 (1973). See also *In re Belser*, 239 S.E.2d 492 (S.C. 1977).

101. Chodos, *supra* note 76, at 434.

102. *Byars v. Stone*, 186 Va. 518, 529, 42 S.E.2d 847, 852 (1947) (citing 7 C.J.S. *Att'y. & Client* § 125 (1916)).

103. The first title insurance company was formed in 1876 as a reaction to the judicial limitation of conveyancer's (abstractor's) liability in the Pennsylvania case of *Watson v. Muirhead*, 57 Pa. 161, 98 Am. Dec. 213 (1868). Comment, *Washington Title Insurer's Duty to Search and Disclose*, 4 U. PUGET SOUND L. REV. 213, 215 n.17 (1980).

The buyer sued [his lay conveyancer] when [it was discovered that] an outstanding judgment clouded the title. The Pennsylvania Supreme Court held for the defendant, concluding that a conveyancer does not guarantee titles he reviews.

or is affiliated with a bar-related company<sup>104</sup> such as the Connecticut Attorney's Title Guaranty Fund,<sup>105</sup> he receives what is essentially a rebate of his client's title premium.<sup>106</sup> If the attorney acts for the title

---

Thus, the first title insurance company was formed by 'lawyers to protect the public against the non-liability of lay scriveners following . . . Watson.'

*Id.* (quoting Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 431-32 (1969)).

Several progressive conveyancers. . . obtained a franchise from the governor of Pennsylvania authorizing the conduct of business by the Real Estate Title Insurance Company whose contracts guaranteed the accuracy of title examinations and indemnified against loss. From Pennsylvania the concept of title insurance as a commercial venture was transplanted into New York and Washington D.C., and ultimately throughout the major metropolitan centers of the nation.

Brossman & Rosenberg, *Title Companies And The Unauthorized Practice Rules: The Exclusive Domain Reexamined*, 83 DICK. L. REV. 437, 446 (1979).

104. Since the formation of the Lawyers Title Guaranty Fund of Florida in 1947, bar-related title insurance companies have sprung into existence in several states. "By 1976, over 10,000 lawyers in nineteen states were active in nine separate bar-related title companies that had assets in excess of eighteen million dollars." Roussel, Pera & Rosenberg, *Bar-Related Title Insurance Companies: An Antitrust Analysis*, 24 VILL. L. REV. 639, 640-41 (1979). "Bar-related companies are established, managed, and controlled by lawyers, and offer title insurance only through lawyers to owners or lenders." *Id.* at 645.

The Florida fund, which has been commended to the bar as a prototype by the ABA is simple in operation and illustrates the fund concept. An attorney, upon becoming a member of the fund, makes an initial contribution and, thereafter, remits further contributions secured from clients as the fund guarantees are issued, all of which are credited to the members account.

Furthermore, each member is credited annually with his proportionate share of income from investments and charged with his share of expenses, including losses, as determined by his fund contributions for the year. Guaranteed claims attributable to policies issued by a member are chargeable to his account. Any remaining credit balance in the member's account is refunded to him at prescribed intervals, thus emphasizing the direct financial interest of the attorney-member in the welfare of the fund.

Rosenberg, *Why Bar Funds Are Not in the Public Interest*, 59 TITLE NEWS 11 (1980). The major purpose of the bar-related title insurance movement is to preserve and expand the role of the private attorney in real estate transactions. See ABA Standing Comm. on Lawyers' Title Guaranty Funds, *How-To-Do-It: Bar-Related Title Assuring Organizations* 9 (1976).

105. The Connecticut Attorney's Title Guaranty Fund, Inc., is specifically authorized by statute, See Act of July 1, 1976. Spec. Act 339, §§ 1-6, 1965 Conn. Spec. Acts 352-58. Connecticut attorneys who write policies receive a share of the profits or a return of reserve credits. See Roussel & Rosenberg, *Lawyer-Controlled Title Insurance Companies: Legal Ethics and the Need for Insurance Department Regulation*, 48 FORDHAM L. REV. 25, 31-32 & n.28 (1979).

106. The practice of commercial title insurance companies paying commissions to attorneys developed in the early years when title insurance was a new idea. A company would "pay a 'commission' to the lawyer who persuaded his client to buy a policy from the title company. . . ." J. LIEBERMAN, *CRISIS AT THE BAR* 116 (1978). With the enactment of the Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (codified at 12 U.S.C. §§ 1730f, 1831b, 2601-2617 (1976)), as amended by Act of Jan. 2,

company and his client simultaneously, by necessity, he surrenders his role as independent legal counsel since he can no longer put the interests of his client first.<sup>107</sup> The purpose of this section is to demonstrate the obvious conflicts of interest that are present when an attorney accepts compensation from a title company for writing a policy for his client.

The ABA has acknowledged the adverse interests that exist between the buyer of real estate and the title insurer. In a report issued by its Special Committee on Residential Real Estate Transactions, and adopted by the House of Delegates of the ABA, the Committee stated:

It is sometimes assumed that there is no conflict between the interests of the title insurer, on the one hand, and the buyer and lender on the other. Any such assumption is false. The insurer wants minimum risk, the other parties maximum protection . . . .<sup>108</sup> What is not understood by the buyer is that, by the nature of the contract, the buyer's interests are in conflict with those of the insurer. . . . The inherent conflict . . . between the interests of the parties stands in the way of the insurer either advising or representing the insured. . . .<sup>109</sup>

Inexplicably, however, the ABA has forgotten its own pronouncements. It has approved the receipt of commissions by a title attorney provided the attorney discloses to the client his financial interest in the transaction, or credits the client's bill with the amount thus received.<sup>110</sup> The ABA assumes that an attorney will be able to

---

1976, Pub. L. No. 94-205, 89 Stat. 1157 (hereinafter referred to as RESPA) referral fees paid to attorneys in situations in which no services are actually performed are illegal. See 12 U.S.C. § 2607 (1974) (also known as "Section 8").

107. "[I]f a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client." CODE EC 5-22. See also CODE DR 5-107(A) which reads as follows: "Except with the consent of his client after full disclosure, a lawyer shall not: (1) Accept compensation for his legal services from one other than his client." *Id.*

108. See *supra* note 12, at 11. This dichotomy places the attorney representing both a purchaser—either as private counsel or as the single attorney involved in a transaction—and a title company or agency in an inherent conflict. On the one hand, as attorney to the purchaser, he is obligated to point out to his client any exceptions on the proposed coverage and attempt to remove them. As principal of the company or agency issuing the policy, however, he has a duty to protect his company by excepting those circumstances which might result in loss. Regardless of the number of lawyers involved in the transaction, these two duties will always conflict when one lawyer represents both title insurance company or agency and the purchaser. Roussel & Rosenberg, *supra* note 105, at 33.

109. See *supra* note 12, at 11.

110. ABA Comm. on Professional Ethics, Formal Op. 304 (1962), *reprinted in* O.



represent the interests of both parties in an adequate fashion.<sup>111</sup>

If an attorney makes a full disclosure of his relationship with, and financial interest in, the title insurance company, he places the client in the embarrassing position of making a choice that could be contrary to the interests of his attorney. At the same time, it is awkward for the attorney to explain why he receives a portion of the premium from the title company. It is not surprising, therefore, that a large number of attorneys disregard the directions of their bar associations and fail to disclose these commissions.<sup>112</sup> In some situations, title companies delay paying the rebate for a period of time so that the connection between the payment and the client is obscured.<sup>113</sup>

Although it is often in the best interests of the client to have title insurance protection,<sup>114</sup> obviously, the attorney with title company connections has a definite monetary interest in recommending it. Moreover, with the requirements of today's mortgage market,<sup>115</sup> real estate attorneys, who are owners or agents of title companies, have a guaranteed commission every time they handle a real estate transaction.<sup>116</sup> Those who advocate these arrangements between attorneys

---

MARU *supra* note 33, at 45 (1970). See also ABA Comm. on Professional Ethics, Informal Op. 883 (1965).

111. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 331 (1972), see O. MARU *supra* note 33, at 2 (1975 Supp.).

112. Lieberman, *supra* note 106, at 117.

113. *Id.*

114. "The difference between a lawyer's title opinion and a title insurance policy is that if there is a hidden defect in the title, the client is indemnified by title insurance, although there is no negligence on the part of the lawyer." Balbach, *Title Insurance Industry Regulation* 67 A.B.A. J. 786, 787 (1981). Insolvency may also be a major deficiency of the lawyer's title opinion. Title insurance relieves this problem by offering a solvent insurer to cover the damages for title losses.

115. Title insurance is usually required by a lender today as a condition of the mortgage commitment. This enables the lender to sell the mortgage on the secondary mortgage market. Because of the need on the part of lending institutions for maximum liquidity, virtually every mortgage must be packaged to sell. The cost of the policy is usually paid for by the borrower-purchaser, although it does not afford him any legal protection.

116. The purchasers of title services are "typically laymen, inexperienced in coping with the processes by which titles are assured. . . ." Whitman, *supra* note 74, at 1336. They do "not comprehend the methods by which title searches, title insurance and closing services are priced. Further, . . . [they are] unaware of the differences in coverage between . . . different forms of title insurance policies." *Id.* at 1337 (footnote omitted).

Title insurers compete for the patronage of lawyers, rather than for the patronage of the ultimate consumer, a process known as 'reverse competition'. Reverse competition raises rather than lowers the price of title insurance because each title company seeks to provide the real estate professional with more compensation or benefits in an effort to secure his referrals of prospective poli-

and title companies argue "that the practicing bar, as a whole, is ethical and will subordinate their personal interests to those of their clients. . . ." <sup>117</sup> Further, the relationship between attorneys and title companies "provides the client with the protection of professional advice combined with insurance indemnification. . . . [It] 'offends no code of ethics, gives rise to no conflict of interest, and is but a wholesome completion of the lawyer's service to the client.' " <sup>118</sup> Such presumptions deny the obvious intent of attorneys to obtain for themselves a significant amount of supplemental income. <sup>119</sup>

When an attorney is personally interested in a title company and its resulting rebates, he has a substantial incentive to complete the transaction despite "borderline defects in title." <sup>120</sup> If he is acting for the seller, the lender or the buyer as well as the title company, his loyalties to himself and the other parties force him to make unfortunate compromises. Imagine, for example, the following circumstances: The attorney has represented a real estate developer for a period of years in the closings of his newly constructed homes. He is also an agent for a title insurance company which provides him with sizable rebates for title policies <sup>121</sup> that he issues to lenders and buy-

---

cyholders. [In Connecticut commercial title insurance companies rebate as much as 60% of the title premium to the attorney.] . . . To the extent that lawyers are . . . able to control the placement of title insurance business by referring prospective policyholders to a specific title company . . . title insurance companies . . . along with the referring lawyer, [are] beneficiaries of reverse competition.

Roussel, Pera & Rosenberg, *supra* note 104, at 644-45 (footnotes omitted). Since January 1, 1984, the Connecticut Attorneys Title Insurance Company also rebates to the attorney who processes and prepares a policy, 60% of the premium collected from the consumer.

117. Va. State Bar Council, Formal Op. 187 (proposed) *reprinted in* Va. B. News 47, 49 (Dec. 1981).

118. Balbach, *supra* note 114, at 787, *quoting* an editorial in JUDICATURE NOV. 1967. This has been the position of several state bar association opinions. *See generally supra* note 33; Conn. Bar Ass'n Formal Op. 34 (1982), *reprinted in* 56 CONN. B.J. 264 (1982); Conn. Bar Ass'n Formal Op. 23 (1972), *reprinted in* O. MARU, *supra* note 33, at 437 (1975 Supp.); Ill. State Bar Ass's Comm. on Professional Ethics, Formal Op. 227 (1963), *reprinted in* O. MARU, *supra* note 33, at 119 (1970); Kan. Bar Ass'n, Formal Op. 3 (1952), *reprinted in* O. MARU, *supra* note 33, at 124 (1970); N.J. Supreme Court Advisory Comm. on Professional Ethics, Formal Op. 12 (n.d.) *reprinted in* O. MARU, *supra* note 33, at 174 (1970); N.Y. City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 309 (1955), *reprinted in* O. MARU, *supra* note 33, at 332 (1970); N.Y. State Bar Ass'n Comm. on Professional Ethics, Formal Op. 351 (1974), *reprinted in* O. MARU, *supra* note 33, at 347 (1975 Supp.); *But see* N.C. State Bar Council Ethics Comm., Formal Op. 17 (1974), *reprinted in* 28 N.C. St. B.Q. 63 (1981).

119. *See infra* note 121.

120. Roussel & Rosenberg, *supra* note 105, at 32.

121. If an attorney issues title insurance policies for lenders and owners in a fifty-lot subdivision of new homes whose selling prices range from \$70,000-\$100,000 and

ers of the subdivision lots. Recently, the developer has experienced financial difficulties with his subcontractors and the attorney knows that there is a good chance that the subcontractor will have a lien placed on the property at any time. The developer has arranged to transfer to his real estate agent, in lieu of commissions he has earned on other homes in the subdivision, four recently constructed homes. As part of the terms of the sale, the buyer-agent will obtain the owner's title insurance policies which provide affirmative coverage<sup>122</sup> against mechanics' lien claims. Customarily, on owners' policies, the title insurance company requires that the developer provide it with waivers of lien<sup>123</sup> signed by any person performing services or providing materials on the new home. In addition, because the title company has suffered substantial losses on mechanics' lien claims in recent years,<sup>124</sup> it will require the developer to sign an indemnity agreement holding the company harmless from any loss that might arise.

The developer argues that his attorney should not advise him to sign such an agreement since, ultimately, he might have to pay substantial attorney's fees to the title company should a contractor or supplier decide to sue.<sup>125</sup> The title company refuses to waive the

---

whose mortgages range from 50-80% of the selling price, the attorney stands to receive a substantial amount of supplemental income. With a rebate of 60% of the premium, *see supra* note 116, he could receive as much as \$10,250 for owners' and simultaneous lenders' policies. If only lenders' policies were issued, he could receive \$4,400 in commissions, based on the commercial title insurance rates established for the State of Connecticut, effective Jan. 15, 1982.

122. "Affirmative coverage" is a positive statement in an insurance policy that a particular protection is provided.

123. A waiver of lien is a document which must be signed by all mechanics or materialmen who have provided services or furnished materials on the job site. It typically contains a description of the property and provides a line for the signature of each supplier or contractor. Lien waivers may be of two types. A waiver of priority is usually signed by a contractor as an inducement to the bank to advance the forthcoming construction proceeds. Thus, the waiver is limited to the priority of the bank over the contractor's rights. An absolute waiver of lien is a statement that the contractor waives his rights to all parties. Often the lien waivers are not legally sufficient to protect the lender or the owner. Controversies arise relating to the amount that is owed, the date the services were performed, and the authorization of the signers. In addition, the potential for fraud is always present. At the bottom of each waiver form, there is an affidavit which must be executed by the owner or developer. Essentially, the signer must swear that the signatures appearing on the waiver are all of those persons who might have a right to claim a lien against the property. Obviously, a contractor or supplier would be unwilling to sign the waiver if he were uncertain of being paid.

124. McNitt, *A Regulator's View of the Title Industry*, 56 TITLE NEWS 7, 16 (1977).

125. The developer suggests to his attorney that he get the policies from another company. He knows, however, that the attorney will receive a large rebate from the title premium. The client wonders whose best interest the attorney has in mind.

indemnity requirement; therefore, the attorney has no choice but to induce his client to sign the agreement. Failure to obtain such an agreement would violate his duty to the title company. While another company may not insist on such an indemnity agreement, the attorney is not an agent for any other company. He will lose the commissions if he does not write the policies with that company.<sup>126</sup>

Change the facts of the above hypothetical so that a subcontractor has filed a mechanic's lien against the developer's property. The developer disputes the claimant's right to the money and has instructed his attorney to defend the claim in court. In the meantime, however, the developer wishes to proceed with the sales in his subdivision. A buyer, unaware of the mechanic's lien, comes to the closing ready to purchase. As a condition of the buyer's mortgage commitment, the attorney must provide a mortgagee policy to the lender. The attorney knows that in order to obtain title insurance protection insuring over the lien,<sup>127</sup> even if it is eventually deemed invalid, the developer must place in escrow with the title company a sum sufficient to cover the lien amount, plus an additional sum to cover potential attorney's fees.<sup>128</sup> In addition, the developer must also indemnify the title company from any loss it might incur.

For the developer, this requirement is not one he can easily accommodate since his problems with the subcontractors stem from a present shortness of funds. The attorney is in a very uncomfortable position. As an agent for the title company, he must act to protect its interest completely.<sup>129</sup> As the attorney for the developer, he knows that unless the sale goes through his client will be subject to additional financial pressures. If he issues the policy to the lender knowing that the lien exists but without its disclosure, he will be committing a fraud.<sup>130</sup> He also has a duty to disclose the lien to the

---

126. Once licensed by the state, an attorney may become a title insurance agent for more than one company. His loyalty to any one title company, however, will usually depend on the size of the rebates and the "cooperation" he receives from the company in providing policies for his clients. *See supra* note 116.

127. To insure "over the lien" the title company will make a statement in the insurance policy that, despite the existence of the lien, it affirmatively provides the insured with protection from any loss that may arise from it.

128. Typically, a title insurance company will hold in escrow a sum equal to 150% of the amount of the claim.

129. He must obtain the necessary indemnity agreement and escrow deposit.

130. In *Gleason v. Title Guarantee Co.*, 300 F.2d 813 (5th Cir. 1962), a title company sued for damages arising from defendant attorney's erroneous opinions that certain titles were clear when, in fact, they were encumbered by outstanding mortgages. *Id.* Damages were awarded for the losses suffered by the title company. *Id.* at 816.

buyer or the buyer's attorney.<sup>131</sup> These hypotheticals are just a sample of the circumstances that can force an attorney to compromise his loyalties.

A Sixth Circuit case, *Collins v. Pioneer Title Insurance Co.*,<sup>132</sup> is a prime example of the conflicts of interest that arise when an attorney is an agent for a title company and also acts for other interested parties. In *Collins*, an attorney acting under pressure from his clients to deliver a clear title and release escrowed funds, submitted a fraudulent title report to the title company.<sup>133</sup> The company, relying on

---

131. In *Attorney Grievance Comm'n v. Lockhart*, 403 A.2d 1241 (Md. App. 1979), the attorney-respondent had certified to a title insurance company that titles were free and clear of liens. The court found he was involved in misrepresentation and that his conduct had been willful. "An attorney's responsibility to a client requires him to guard against unfortunate eventualities . . . Respondent should not have gambled that the purchasers would ultimately hold title . . . free and clear of the liens. . . ." *Id.* at 1251. Respondent was suspended from the practice of law for a period of one year. *Id.* at 1247.

132. 629 F.2d 429 (6th Cir. 1980).

133. *Id.* at 432. The facts of the case, although somewhat complex, demonstrate clearly the pressures exerted upon an attorney when he acts for more than one party. Collins, a Florida Attorney, obtained an option to purchase land in Tennessee. The option expired on February 28, 1972. Just before the expiration date, the owners contracted with a second buyer, Chalupsky, to purchase the property subject to the prior agreement with Collins. *Id.* at 431.

On February 27, 1972, Collins' attorney, defendant Ables, informed him that the title was clear. Collins informed the owner's attorney on February 29, 1972 (one day too late) that he intended to proceed with the purchase, at which time they set the closing date. A few days later, Collins learned of the second sales contract. *Id.*

Despite his failure to timely notify the owners of his intent to go forward, Collins was able to convince them to proceed with the sale. Shortly thereafter, Ables and Collins were notified by the agent for the second buyer that he intended to enforce his claim to the land. The Chalupsky suit was filed on March 13, 1972. The owners of the property contacted Collins' attorney Ables and retained him to defend the suit. *Id.* at 431-32.

A warranty deed running to Collins was backdated to the last date of the option period and recorded on March 22, 1972. Collins, intent on protecting his deposit, instructed the escrow agent not to release the down payment until the litigation was completed. *Id.* at 432. It was also at that time that he requested Ables to secure a policy of title insurance for the property. He insisted on a policy which showed no exception for the Chalupsky litigation and conditioned release of the down payment on obtaining such a policy. Ables was also under pressure from the owners to have the deposit released. He succumbed to the pressures from both clients by submitting a preliminary title report to Pioneer Title Insurance Company which omitted the reference to the Chalupsky lien. *Id.*

During the course of the transaction, Ables was an "approved attorney" for Pioneer. *Id.* In the "approved attorney" system, the title insurer predicates the policy on an independent lawyer's certificate: the policy, therefore, protects against errors the examining lawyer may have made. Although the insured may sue the title company if a nonexempt defect arises, the title company may in turn sue the lawyer if failure to find or report such defect constitutes professional error. Comment, *supra* note 103, at 214 n.13.

his report, issued an owner's policy,<sup>134</sup> showing the title free of any liens. Later, in a suit by a lien holder, the client lost his interest in the land and he sued his attorney and the title company for his losses.<sup>135</sup>

An interesting issue presented in the case was whether an attorney who acted for the title company was the agent for the title company or the insured owner.<sup>136</sup> Tennessee had statutes which

---

*See also* Taub, *Rights and Remedies Under a Title Policy*, 15 REAL PROP., PROB. & TRUST J. 422, 439 (1980).

Pioneer issued an owner's policy to Collins based solely on the information submitted by Ables. It was several months after the policy was issued that Collins and Ables first notified Pioneer of the Chalupsky litigation. After Collins was named a party in the suit, he requested Pioneer to represent him pursuant to the terms of the policy. 629 F.2d at 432-33.

Collins lost his claim to the land in the Chalupsky case. Subsequently, he brought suit against Pioneer. At trial, the jury found Pioneer liable to Collins on the policy in the sum of \$50,000. Collins also was awarded \$5,000 for Ables' negligence. *Id.* at 433.

On appeal, Pioneer and Ables argued that Collins' conduct precluded recovery. The court agreed and Collins was prohibited from recovering from Pioneer since his agent, Ables, misrepresented the status of title by failing to disclose the Chalupsky claim to Pioneer. *Id.*

It is extremely important for the attorney for a prospective insured to be totally candid with the proposed title insurer as to any facts known to the attorney that might bear on the risk. An attorney whose failure to disclose resulted in the loss of title insurance coverage, which in turn resulted in loss to the client, would undoubtedly be personally responsible to the client for that loss.

Pedowitz, *Title Insurance—What Every New York Lawyer Should Know*, 52 N.Y. ST. B.J. 394, 397 (1980).

The Sixth Circuit found that such misrepresentation voided the policy. At the same time, Collins was estopped from recovering from Ables because he knew that Ables had not disclosed the Chalupsky claim to Pioneer. 629 F.2d at 434.

Collins argued that Ables acted as Pioneer's agent, and that under agency law it was bound by the knowledge of its agent. Two statutes, TENN. CODE ANN. §§ 56-705 (repealed 1975) and 56-35-120 (1980 & Supp. 1982) conflicted on the role of the attorney as insurance agent. The court held that § 56-35-120 was applicable. Even if Ables were Pioneer's agent, "[t]he principal is not ordinarily charged with the knowledge of the agent in a matter where the agent's interests are adverse to those of the principal." *Id.* at 436 (quoting *First Nat'l Bank v. Hawkins County*, 62 Tenn. App. 459, 465, 463 S.W.2d 946, 949 (1970)).

134. There are two basic types of title policies—the homeowner (or fee) policy and the mortgagee policy. The homeowner's policy insures the fee against title defects for an indefinite period of time—for as long as the insured retains title—while the mortgagee policy covers the fee only during the life of the policy.

P. GOLDSTEIN, REAL ESTATE TRANSACTIONS 259 (1980).

135. 629 F.2d at 431-33.

136. In *Weir v. City Title Ins. Co.*, 125 N.J. Super. 23, 308 A.2d 357 (1973), a failure by the attorney for the insured to disclose conditions affecting the risk made the contract voidable at the insurer's option. *Id.* at 29-30, 308 A.2d at 361. Although the attorney was on the title company's list of approved attorneys, the court held that this did

conflicted as to the role of the attorney as insurance agent.<sup>137</sup> The court found, however, that even if the attorney were the company's agent, his knowledge would not be imputed to the title company because he was acting adversely to the interests of his principal, the title company.<sup>138</sup> This case did not resolve the related question of whether an innocent insured<sup>139</sup> would be precluded from collecting under a title policy for damages caused by the fraudulent acts of the attorney who issued the policy, because the client in *Collins* was a participant in the nondisclosure of the lien.<sup>140</sup>

The conflicts of interest created by attorney-title company alliances have been largely ignored by the bar in regulating the ethics of the legal profession. Ethics opinions<sup>141</sup> permitting these dubious practices are mere pretexts justifying the obvious self-dealing of attorneys. Dissatisfaction with the effectiveness of the bar to regulate itself has resulted in some pressure for legislative action. To date, however, few states have acted to prohibit attorneys from receiving commissions, rebates or dividends for issuing title policies for their

---

not make him any the less the agent of his client, nor did it make the client any the less chargeable with the knowledge of his attorney. *Id.* at 31, 308 A.2d at 362.

137. 629 F.2d at 435. *See supra* note 133.

138. This is consistent with RESTATEMENT (SECOND) OF AGENCY §§ 389, 391, 394 (1958).

139. The client, Collins, was found to be *in pari delicto* with Ables because he knew that Ables had not disclosed the Chalupsky claim to Pioneer. 629 F.2d at 433.

140. In a choice between an innocent buyer or lender and the title company, the result may be different. *Farr v. Newman*, 14 N.Y.2d 183, 191-93, 199 N.E.2d 369, 373-75, 250 N.Y.S.2d 272, 278-80 (1964) (Van Voorhis, J., dissenting). Normally, the agent's knowledge is not imputed to his principal when the agent is defrauding or otherwise acting against the interest of his principal for the benefit of another. *Benedict v. Arnoux*, 154 N.Y. 715, 730, 49 N.E. 326, 330 (1898). But, the mere fact that the attorney acts for more than one party in a real estate transfer will not insulate the client from his agent's knowledge. *Farr*, 14 N.Y.2d at 187, 199 N.E.2d at 373, 250 N.Y.S.2d at 275. A conflict of interest does not avoid imputing knowledge. *See* RESTATEMENT (SECOND) OF AGENCY § 282 comment (c) (1958) which states in relevant part: "Meaning of 'acting adversely.' The mere fact that the agent's primary interests are not coincident with those of the principal does not prevent the latter from being affected by the knowledge of the agent if the agent is acting for the principal's interests." *Id.* The comment gives an example. "In investigating the title, A discovers an unrecorded equitable interest owned by T and, believing that the transaction will not be consummated if he reveals this equity to P, conceals his knowledge from P, who buys Blackacre upon A's favorable report. P is affected by A's knowledge." RESTATEMENT (SECOND) OF AGENCY § 282 comment c, illustration 4 (1958). *See also* illustration 5 following comment on subsection 2, clauses (a) and (b). It is only when the agent totally abandons his principal's business, as by taking a bribe from the grantor for his silence, that the principal is unaffected by the agent's knowledge. *Id.* *See also* RESTATEMENT (SECOND) OF AGENCY §§ 159, 161 (1958). If the company is held liable for a loss caused by the adverse acts of its agent, it would in turn sue him for breach of fiduciary duty. *Id.* §§ 391, 394, 440.

141. *See supra* note 118.

clients.<sup>142</sup> This is primarily because the public has remained ignorant of the practice as it exists and has relied on the bar to protect its interests.<sup>143</sup> Regulation at the federal level<sup>144</sup> could resolve the problem.

#### IV. FEDERAL ACTION

Conveyance practices in the United States have traditionally been a matter of local law and custom.<sup>145</sup> Title practitioners and other real estate professionals function in a system which is characterized by little or no competition.<sup>146</sup> Consequently, it is not surprising that efforts on the federal level to regulate the settlement process resulted in a fierce battle by some to protect their vested interests.<sup>147</sup>

---

142. See, e.g., N.C. GEN. STAT. § 58-135.1 (1975), which prohibits a real estate agent, attorney or lender whose services are incidental to any real estate transaction from receiving a rebate, commission or other payment in connection with the issuance of title insurance in the same transaction. Any person violating § 58-135.1 is guilty of a misdemeanor and subject to a fine of \$1,000 or imprisonment not exceeding six months or both. See also N.H. REV. STAT. ANN. § 417.4X (Supp. 1979); N.J. STAT. ANN. §§ 17:46B-34, 17:46B-35 (West Cum. Supp. 1981-1982); and N.Y. INS. LAW § 440(2) (McKinney Cum. Supp. 1981-1982).

143. Whitman, *supra* note 74, at 1336-40.

144. In *Fitzgerald v. Chicago Title & Trust Co.* 72 Ill.2d 179, 380 N.E.2d 790 (1978), a class action was brought by purchasers and vendors against a title insurance company for failure to disclose rebates paid to the bank which ordered and purchased title policies for the plaintiffs. The Supreme Court of Illinois affirmed that such practices could be an unfair or deceptive trade practice under the Illinois Consumer Fraud and Deceptive Business Practice Act, ILL. REV. STAT. ch. 121 1/2, § 262 (1973). Due to the lack of precedent on the state level, the court allowed consideration to be given to the interpretations of the Federal Trade Commission Act, § 5(a), 15 U.S.C.A. § 45(a) (West Supp. 1976). 72 Ill.2d at 184, 380 N.E.2d at 793. Although this suit was based on the Illinois Consumer Fraud and Deceptive Business Practice Act, an alternate route might have been through RESPA. See *supra* note 106.

145. "Few industries in the United States are as localized, diverse, fragmented, and tied to idiosyncratic custom and tradition as those which provide settlement services and home financing." U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, INTERIM REPORT TO THE CONGRESS ON SECTION 15 OF THE REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974 at 25 reprinted in Payne, *Conveyancing Practice and the Feds: Some Thoughts About RESPA*, 29 ALA L. REV. 339, 342 n.11 (1978).

146. See Whitman, *supra* note 74, at 1329-40.

147. According to Senator Proxmire, RESPA was "largely the creature of an intensive lobbying campaign by the land title industry to head off any direct limitations on excessive charges." *Oversight on the Real Estate Settlement Procedures Act of 1974: Hearings on S. 2327 and S. 2349 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 1 (1975) [hereinafter cited as *Oversight Hearings*]. Lawyers, real estate brokers, mortgage lenders and title insurance companies were a potent influence in curbing the effects of the legislation. *Mortgage Settlement Costs: Hearings on S. 2775 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 2d Sess. 54 (1972) (remarks of Alvin W. Long).



The law that ultimately emerged, the Real Estate Settlement Procedures Act (RESPA),<sup>148</sup> was the culmination of several years of congressional consideration of real estate costs and practices.<sup>149</sup> Among the factors leading to its enactment was the recognition that certain abusive practices, prevalent in the settlement industry, increased closing costs.<sup>150</sup> Because of intense lobbying by certain interest groups, the act in its final form bore little resemblance to the earlier bills that had expressed its founding purpose.<sup>151</sup>

### A. *Before RESPA*

RESPA was signed into law on December 22, 1974 and became effective on June 20, 1975.<sup>152</sup> Before its enactment, federal regulation of real estate matters had been limited to the financing of homes under programs administered by the Veterans' Administration (VA)<sup>153</sup> and the Department of Housing and Urban Development (HUD).<sup>154</sup> In 1969-70, for reasons that are not entirely clear,<sup>155</sup> a

---

148. Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 1730f, 1831b, 2601-2617 (1976)).

149. For a detailed chronicle of the events leading to the passage of RESPA see D. BURKE, *AMERICAN CONVEYANCING PATTERNS* 133-77 (1978).

150. 12 U.S.C. § 2601 (1976).

151. For instance, the Act was far less comprehensive than H.R. 12066 introduced by Congresswoman Leonor K. Sullivan in 1972, or H.R. 13337 introduced by Congressman Patman in 1972. House Bill 13337 (short cited as Real Estate Settlement Cost Reform Act of 1972) included provisions intended to eliminate conflicts of interest. Section 102(a) sought to correct what has been sometimes referred to as the one lawyer syndrome, a practice where one attorney acts for more than one party in a real estate transaction. Section 102(a) read as follows:

No person shall charge any buyer of residential real property who has obtained a federally related mortgage loan for services performed by any attorney which are incident to or part of a real estate settlement relating to such property unless such buyer has personally retained [sic] such attorney and such attorney represents only the interests of buyer in connection with such settlement.

*Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings on H.R. 13337 Before Subcomm. on Housing of the House Comm. on Banking & Currency, 92d Cong., 2d Sess. 304 (1972) [hereinafter cited as 1972 Hearings on H.R. 13337].*

152. RESPA was signed by President Ford on Dec. 22, 1974, but it did not become effective until 180 days thereafter. 12 U.S.C. § 2601 (1982). The 180-day period was designed to permit the Department of Housing and Urban Development (HUD) to implement regulations and to allow settlement service providers time to come into compliance with RESPA.

153. 38 C.F.R. § 36.4312 (1982).

154. 24 C.F.R. § 203.27 (1982).

155. It has been suggested that, perhaps accumulated abuses were exaggerated by the efforts of lenders, in a tight money market, to increase their take . . . [or that] . . . borrowers, increasingly hard pressed, suddenly became aware of exactions they might have ignored in other

tide of opinion developed in Congress to lower the closing costs imposed on home buyers. Shortly thereafter, the Emergency Home Finance Act of 1970<sup>156</sup> was enacted. It directed the Secretary of HUD and the Administrator of the VA to make an investigation of closing costs and report to Congress on its findings.<sup>157</sup> The study and recommendations included not only government assisted mortgage transactions but also all real estate transactions, particularly those in which unsophisticated purchasers or sellers were unfamiliar with the complex details of transferring title.<sup>158</sup> Among the findings reported to Congress in 1972 were the following:

6. The buyer seldom decides who will provide settlement services for him. If there is a choice, he usually depends upon advice of the broker, escrow agent, seller or settlement attorney. Often the buyer is or believes he is required to deal with a particular source for some or all settlement services.

7. Competitive forces in the conveyancing industry manifest themselves in an elaborate system of referral fees, kickbacks, rebates, commissions and the like as inducements to those firms and individuals who direct the placement of business. These practices are widely employed, rarely inure to the benefit of the homebuyer, and generally increase total settlement costs.<sup>159</sup>

For two years following the HUD-VA report, Congress considered numerous bills restricting settlement costs.<sup>160</sup> The advance dis-

---

circumstances . . . [or that] . . . because the construction industry was in the doldrums, at least some members of Congress might have been searching for a whipping boy. Payne *supra* note 145, at 353 n.42.

156. Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450 (1970) (codified in scattered sections of 12 U.S.C.).

157. They were directed to "undertake a joint study and make recommendations. . . with respect to legislative and administrative actions which should be taken to reduce mortgage settlement costs and to standardize these costs for all geographic areas." *Id.*

158. H.R. REP. NO. 1131, 91st Cong., 2d Sess. 12-13 (1970).

159. See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT & VETERANS' ADMINISTRATION REPORT ON MORTGAGE SETTLEMENT COSTS 2-3, reprinted in *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 92d Cong., 2d Sess. 2-3 (1972).

160. H.R. 9989, introduced by Congressman Stephens; H.R. 11183, introduced by Congressman Moakley; H.R. 12066 introduced by Congresswoman Sullivan. See *Real Estate Settlement Cost Hearings on H.R. 9989, H.R. 11183, H.R. 11460 and H.R. 12066 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 93d Cong. 1st & 2d Sess. 2, 21, 562 (1973-74) [hereinafter cited as *Real Estate Settlement Cost Hearings of 1973-74*]; S. 3164, introduced by Senator Brook; and S. 3232, introduced by Senator Proxmire, S. REP. NO. 866, 93d Cong., 2d Sess. 2-3, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6546, 6547.

closure legislation that emerged was a compromise reached only after heated debate in both houses of Congress.<sup>161</sup> As enacted and later amended,<sup>162</sup> RESPA applies to transactions involving the purchase of real property containing a one to four-family dwelling, financed by a first mortgage loan that is made by a lender regulated or insured by the federal government.<sup>163</sup>

### B. *Disclosure Provision*

Many of RESPA's provisions are directed toward disclosure rather than regulation.<sup>164</sup> A special information booklet written by HUD must be distributed by lenders to borrowers at the time of a mortgage application.<sup>165</sup> It explains in very simple terms the various provisions and requirements of RESPA. Of particular importance are the references to unfair practices and unreasonable and unnecessary charges that can be avoided in the settlement process.<sup>166</sup> Before RESPA was amended, the lender was obligated to make advance

---

161. 120 CONG. REC. 28, 260-83 (1974); 120 CONG. REC. 24, 735-42 (1974).

162. *See supra* note 106.

163. 12 U.S.C. § 2602(1) (1976) (also referred to as "Section 1").

164. *Id.* §§ 2603-2605 (repealed by Act of Jan. 2, 1976, Pub. L. No. 94-205, § 5, 89 Stat. 1157, 1158) and 2606 (repealed by Act of Jan. 2, 1976, Pub. L. No. 94-205 § 6, 89 Stat. 1157, 1158).

165. 12 U.S.C. § 2604 (1976) (also referred to as "Section 5"). *See* OFFICE OF CONSUMER AFFAIRS AND REGULATORY FUNCTIONS, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SETTLEMENT COSTS: A HUD GUIDE (rev. ed. 1976) *reprinted in* P. BARRON, FEDERAL REGULATION OF REAL ESTATE, THE REAL ESTATE SETTLEMENT PROCEDURES ACT 6-3 (Cum. Supp. 1982).

166. *Id.* One section of the booklet entitled "Selecting an Attorney" includes the following:

If you seek the aid of an attorney, first ask what services will be performed for what fee. If the fee seems too high, shop for another lawyer . . . Will the attorney represent any other party in the transaction in addition to you? In some areas attorneys act as closing agents handling the mechanical aspects of the settlement. A lawyer who does this may not fully represent your interests since, as closing agent, he would be representing the seller and other interests as well.

*Id.* at 6-10.

Another section of the booklet entitled "Lender Designation of Settlement Service Providers" warns the consumer as follows:

Some lending institutions follow the practice of designating specific settlement service providers to be used for legal services, title examination services, title insurance, or the conduct of settlement.

Where this occurs the lender, under RESPA, is required to provide you as part of the good faith estimate a statement in which the lender sets forth: . . . [w]hether each designated firm has a business relationship with the lender.

While designated firms often provide the services needed, a conflict of interest may exist. Take, for example, the situation where the provider must choose between your interests and those of the lender. Where legal services are

disclosure to the buyer and seller of the actual settlement costs that the parties would incur at the time of closing.<sup>167</sup> The goal of the information booklet and advance disclosure was to create a more informed consumer who would compare costs. This would result in better services and more competitive prices.<sup>168</sup>

Shortly after the enactment of RESPA, an enormous outcry by the real estate industry, led to more congressional hearings.<sup>169</sup> Legislative action quickly followed. The last vestige of advance disclosure of the actual settlement costs was relinquished in a compromise between both houses.<sup>170</sup> RESPA, as amended,<sup>171</sup> provides that the ob-

---

involved, it is wise to employ your own attorney to ensure that your interests are properly protected.

*Id.* at 6-15. This booklet is really the only notice that consumers receive involving the potential conflicts of interest present in the settlement process.

167. 12 U.S.C. § 2605 (1974), *amended by* 12 U.S.C. § 2605 (1976).

168. Whether RESPA, through its disclosure provisions, accomplished this goal must be seriously doubted. Most commentators agree that the disclosure came far too late in the settlement process to have any effect on the choice of settlement providers. *See Payne, supra* note 145, at 360. These doubts were expressed both in and out of Congress. It must be assumed that the disclosure route was the course of least resistance from the drafters' point of view. Once again, disclosure was used to overcome the deficiencies in the law. As inoffensive as the disclosure provisions of RESPA were, they managed to stir up strong feelings almost immediately. The primary complaints centered around the twelve-day disclosure period and the heavy paperwork burden imposed upon mortgage lenders. *See, e.g., Hearings on the Real Estate Settlement Procedures Act of 1974: Hearings on H.R. 5352, S. 2327 and H.R. 10283 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking and Currency, 94th Cong., 1st Sess. 132-36 (1975).*

169. *Id.* *See also Oversight Hearings supra* note 147, at 74-80.

170. Congresswoman Leonor K. Sullivan was among the strongest proponents of the advance disclosure requirement.

[I]t is . . . taking only five months of real estate industry lobbying pressure to convert [RESPA] into a hollow shell which would permit elements of the industry to resume doing many of the very things which made the original law necessary. . . . The Act [in its final form] was watered down so substantially that all of the trade associations in the real estate industry supported it last year. . . . [The proposed amendment S. 2327 is being] promoted by the professionals in the real estate industry who perhaps do not want their consumers to learn how to negotiate better terms for legal fees, title search, title insurance and other expenses of acquiring a mortgage and home. . . .

Ideally, every home buyer should have at every stage from sales contract signing to settlement a lawyer who represents only the buyer. Instead, the lawyer whose fee the home buyer is paying is often the lender's lawyer as well, and may also be representing the title company, too, and may even be sharing in the premium for title insurance. Such arrangements have been documented in our hearings. But until home buyers become sophisticated enough to obtain their own lawyers before entering into far-reaching real estate transactions, Section 6 of RESPA, as presently written, is their only real protection against excessive charges. . . .

Dissenting views of Rep. Leonor K. Sullivan to S. 2327 *reprinted in* U.S. CODE CONG. & ADM. NEWS, 94th Cong. 1st Sess. 2457-60 (1975).

171. The amendment was signed into law on Jan. 2, 1976, Pub. L. 94-205.

ligation to make the information available prior to settlement must be triggered by the request of the borrower. The disclosure need not be sooner than sometime during the business day preceding the day of settlement.<sup>172</sup> Essentially, this was a capitulation of the major benefit of advance disclosure; it eliminated the consumer's option to compare prices.

### C. *Kickbacks*

Among the abuses sought to be remedied by RESPA, the provision prohibiting the giving or taking of kickbacks<sup>173</sup> is closely connected to the issues of dual representation and conflicts of interest. The term "kickback" refers to an arrangement in which a person is able to influence or control a source of income. The money paid, the kickback, is compensation for referral of business, with little or no services provided by the recipient. In the context of purchasing a home, the opportunities to refer business to someone are present at every stage of the transaction. Studies presented prior to the enactment of RESPA indicated that the prevalence of referral fees, kickbacks, rebates and commissions produced inflated costs to the homebuyer. Sections 8 and 9 of the Act<sup>174</sup> were Congress' answer to the kickback problem.

---

172. 12 U.S.C. § 2603(b) (1976).

173. 12 U.S.C. § 2607(a) (1976) (also referred to as "Section 8").

(a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person. (b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. (c) Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance. . . . (d)(1) Any person or persons who violate the provisions of this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both. (2) In addition to the penalties provided in paragraph (1) of this subsection, any person or persons who violate the provisions of subsection (a) shall be jointly and severally liable to the person or persons whose business has been referred in an amount equal to three times the value or amount of the fee or thing of value, and any person or persons who violate the provisions of subsection (b) shall be jointly and severally liable to the person or persons charged for the settlement services involved in an amount equal to three times the amount of the portion, split, or percentage . . . . *Id.*

174. 12 U.S.C. §§ 2607, 2608 (1976).

Section 8(a) contains a general prohibition against kickbacks and unearned fees. Section 8(b) provides that any fee received must be for services actually performed. The penalty for one who gives or accepts a kickback<sup>175</sup> may include a fine of \$10,000 and imprisonment not to exceed one year.<sup>176</sup>

Section 9(a) prohibits a seller from requiring that title insurance be purchased by the buyer from a particular title company as a condition to selling the property. Congress' focus on the seller, however, is a sleight of hand; that is, a diversion away from other beneficiaries of title company rebates.<sup>177</sup> Some land developers undoubtedly influence their buyers to use particular title companies; nevertheless, attorneys have always been<sup>178</sup> and continue to be a primary source of referrers of business to title companies and are the recipients of commissions or rebates for such referrals.

Section 8(c) expressly excludes certain payments from the general prohibition against kickbacks in Sections 8(a) and 8(b). The first two exclusions<sup>179</sup> are relevant to the issue of fees paid to attorneys by title companies. The motivation behind them is obvious. Once an attorney becomes an agent of a title company, the simple preparation of a title application or policy may be enough to satisfy

---

175. A kickback may include something other than money. Both RESPA and Regulation X, 24 C.F.R. § XX part 3500.14(b) (1981) give "payment" or "thing of value" the broadest meaning. The regulations suggest several examples of what constitutes a thing of value:

monies, things, discounts, salaries, commissions, fees, duplicate payment of a charge, stock, dividends, distributions of partnership profits, credits representing monies that may be paid at a future date, special bank deposits or accounts, banking terms, special loan guarantee terms, services of all types at special or free rates, sales or rentals at special prices or rates.

24 C.F.R. § XX part 3500.14(b) (1981).

176. 12 U.S.C. § 2607 (d)(1) (1976).

177. In fact, H.R. 12066, a bill introduced by Congresswoman Leonor Sullivan prior to the enactment of RESPA (short titled: Real Estate Settlement and Escrow Act of 1973) contained a section 9(a) which prohibited an attorney who performed legal services incident to a real estate settlement from receiving any commission in connection with the issuance of title insurance. *See Real Estate Settlement Cost Hearings of 1973-74 supra* note 160, at 562, 575. A similar bill introduced by Congressman Patman, H.R. 13337 also prohibited the payment of commissions to attorneys by title companies. *See 1972 Hearings on H.R. 13337 supra* note 151, at 303-04.

178. *See supra* note 106.

179. 12 U.S.C. § 2607(c) (1976). "Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance . . . ." *Id.*

the "services" mentioned in Sections 8(b) and 8(c).<sup>180</sup> According to Regulation X, which clarifies RESPA, a violation may occur if the payment received exceeds the reasonable value of the services performed by the attorney.<sup>181</sup> Unfortunately, RESPA does not provide a test for determining reasonable value.<sup>182</sup> That question must be decided by the facts of each case.

#### D. *The Problem with RESPA*

The basic thrust of RESPA was to reduce settlement costs and to enable consumers to understand the process of home purchase and settlement.<sup>183</sup> Viewed from that perspective, RESPA is an obvious failure.<sup>184</sup> Its disclosure provisions have been gutted to the ex-

---

180. In fact thousands of attorneys in the East receive substantial rebates or commissions for the routine preparation of title applications or policies. See *supra* note 121.

181. 24 C.F.R. § XX part 3500.14(e) (1981). See also Informal Opinion issued by HUD No. 223 dated Aug. 29, 1981 concerning what is meant by RESPA, Section 8(c) as it relates to the payment of earned fees by a title company to its duly appointed agent for the agent's services to the company.

Authorized agents would be expected to perform all of the duties normally performed in the issuance of title insurance . . . in order to fall within the provisions of Section 8(c). The mere designation of an individual as an authorized agent does not trigger Section 8(c). The non-performance of such services may well result in the characterization of an otherwise intended commission to an agent as a kickback or an unearned fee.

[A] violation may occur where commission rates are excessive. While the statute does not establish commission rates . . . clearly excessive commissions may be a violation.

reprinted in P. BARRON, FEDERAL REGULATION OF REAL ESTATE, THE REAL ESTATE SETTLEMENT PROCEDURES ACT 5-218 (Cum. Supp. 1982). Informal Opinions issued by HUD are not binding on HUD or any other federal agency. *Id.*

182. Appendix B to Regulation X provides examples of facts and comments on Section 8 for further clarification of the regulations. The following is an excerpt from Appendix B:

While particular illustrations may refer to particular providers of settlement services, such illustrations are applicable by analogy to providers of settlement services other than those specifically mentioned. . . .

6. *Facts:* A, a real estate broker, obtains all necessary licenses under state law to act as a title insurance agent. A refers individuals who are purchasing homes in transactions in which A participates as a broker to B, a title company for the purchase of title insurance services. A fills out a simple form but performs no other services in connection with the issuance of the title insurance policy. B pays A a commission for the transactions.

*Comments:* The payment of a commission by B to A under circumstances where no substantial services are being provided by A to B is a violation of Section 8 of RESPA.

24 C.F.R. § XX part 3500.14 app. B (1981).

183. See Congressional findings and purpose, 12 U.S.C. § 2601 (1976).

184. That is exactly what HUD found in its studies following the enactment of

tent that they have lost their effectiveness. Section 8's correction of abuses is almost nonexistent and Sections 9's is misdirected.<sup>185</sup>

Although well-intentioned, Congress may have underestimated the complexity of the conveyancing problem. Many areas of conflict that surfaced during the hearings ultimately were left unattended.<sup>186</sup> In its myopic focus on reducing closing costs, Congress only skimmed the surface of the problem. The cost of services is only the threshold issue. What the consumer actually gets for his money is the more important question. "High closing costs, if they are associated with the supply of needed services, are not necessarily objectionable. Likewise, low costs, if they are associated with a low level of services, can be counterproductive."<sup>187</sup> Although high cost is not the measure of value, an examination of one without the other is senseless.<sup>188</sup>

One of the major reform goals of RESPA was to educate the consumer. Yet, attempts to provide more qualitative information were doomed from the start because the educating process began at the mortgage application stage.<sup>189</sup> The information booklet provided by the lender<sup>190</sup> is supplied too late in the transaction to allow the consumer any effective choice among settlement service provid-

---

RESPA. As part of Section 2612(a) of RESPA (1976), HUD was directed to submit a report to Congress not more than five years from RESPA's enactment, on the need for further legislation in the settlement area. After some delay, that report was submitted in September of 1981. Among the measures that HUD considered was a requirement that lenders of federally related mortgage loans bear the costs of particular real estate settlement services that would otherwise be paid for by borrowers. 12 U.S.C. § 2612(b)(1) (1976).

In its report, *See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT REPORT TO CONGRESS ON THE NEED FOR FURTHER LEGISLATION IN THE AREA OF REAL ESTATE SETTLEMENTS*, reprinted in P. BARRON, *FEDERAL REGULATION OF REAL ESTATE, THE REAL ESTATE SETTLEMENT PROCEDURES ACT* 5-254 through 5-278 (Cum. Supp. 1982), HUD enthusiastically recommended the use of lender packaging of settlement services in lieu of RESPA regulation. *Id.* Recommendations, Section IV. A discussion of those recommendations is beyond the scope of this comment. Reference is made thereto for an interesting examination of what may be the direction that Congress is taking in the settlement area. For an evaluation of the lender pay concept *see* Stoppello, *Federal Regulation of Home Mortgage Settlement Costs: RESPA and its Alternatives*, 63 MINN. L. REV. 367, 398-421 (1979).

185. *See supra* notes 170-73, 167 & 178 and accompanying text.

186. Payne, *supra* note 145, at 369.

187. *Id.* at 370.

188. *Id.*

189. *See supra* note 165 and accompanying text. This occurred due to the adoption of the federally related mortgage loan as the basis of the exercise of federal power to regulate the settlement process.

190. *Id.*



ers.<sup>191</sup> Since time is of the essence in a real estate transaction, buyers and sellers often defer to the advice of their brokers.<sup>192</sup> The result is that consumers are not likely to take extra time to compare settlement prices or services. In addition, many buyers continue to remain ignorant of the collusive practices which still permeate the settlement process. Attorneys, brokers, land developers, lenders and title companies are tied together, sometimes under the color of law, in networks which perpetuate the anticompetitive features of the real estate market.<sup>193</sup> Any realistic regulation of the settlement problem must include a serious effort to educate the consumer at the early stages of the transaction.

## V. THE MODEL RULES OF PROFESSIONAL CONDUCT

The Commission on Evaluation of Professional Standards, popularly called the Kutak Commission, was established by the ABA in 1977 to consider and make recommendations regarding modification of the Code.<sup>194</sup> This led to a final draft of the proposed Model Rules of Professional Conduct (Model Rules) which was published by the ABA Commission on May 30, 1981.<sup>195</sup> Later, the ABA

---

191. Most often the selection of an attorney is made at the signing of the contract or shortly thereafter.

192. Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets*, 29 STAN. L. REV. 931, 944 (1977).

193. Although RESPA may have eliminated the more blatant kickback arrangements, many abuses still remain. See *supra* notes 164-68 and accompanying text. Attorneys are tied to lenders in various ways, not the least of which is that they often serve on bank boards. In addition, as stockholders they wield coercive power in the procurement of bank business. While lending institutions have the right to choose their own counsel, many borrowers are unrepresented because they mistakenly believe that the lender's attorney will protect their interests. RESPA tried to rectify this problem though the use of the information booklet. See *supra* note 166. 24 C.F.R. 3500.7(e) (1982) provides that where the lender requires that a particular attorney be used to provide legal services and where the buyer will pay all or a portion of the cost of such services, the lender is required to provide a statement that the provider has a business relationship with the lender. *Id.*

Brokers are often in a position conducive to the referral of business to both attorneys and lenders. See Payne, *A Typical House Purchase Transaction in the United States*, 30 CONV. & PROP. LAW (n.s.) 194 (1966), reprinted in P. GOLDSTEIN, REAL ESTATE TRANSACTIONS 4 (1980). Attorneys can reciprocate by utilizing the brokers for appraisal work. In addition, if the broker is arranging a mortgage, he may use the attorney's influence with the lender to obtain the loan. Attorneys are allowed to accept finder's fees in some jurisdictions, whether or not licensed as brokers. The connections between attorneys, land developers and title companies have been discussed elsewhere in this comment. See *supra* notes 45-74, 102-44 and accompanying text.

194. MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter cited MODEL RULES] Chairman's Introduction (as adopted Aug. 3, 1983).

195. *Id.*

prepared a revised final draft which was submitted to the ABA House of Delegates on June 30, 1982. That final draft with further revisions, was formally adopted by the ABA House of Delegates at its meeting of August 3, 1983, and now represents the official policy of the ABA.<sup>196</sup>

The Kutak Commission reiterated, in the Model Rules, the familiar premise that "[l]oyalty is an essential element in the lawyer's relationship to a client,"<sup>197</sup> but it followed the course of least resistance when defining the test of impermissible professional conduct. Rule 1.7 of the Model Rules,<sup>198</sup> which sets out the general rule on conflict of interest, allows the lawyer to represent a client even though the lawyer's own interests or other responsibilities might adversely affect the representation of a client. If the lawyer reasonably believes<sup>199</sup> that the other responsibilities or interests involved will not adversely affect the best interest of the client, and the client consents after consultation,<sup>200</sup> the representation is approved.<sup>201</sup>

---

196. The MODEL RULES, like the MODEL CODE, are "designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the . . . rules." MODEL CODE, Preamble and Preliminary Statement.

197. MODEL RULES, Rule 1.7 comment.

198. Rule 1.7 reads as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES, Rule 1.7.

199. "'Reasonably believes' . . . when used in reference to a lawyer [means] that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." MODEL RULES, Terminology. "'Reasonably' when used in relation to conduct by a lawyer [means] the conduct of a reasonably prudent and competent lawyer." *Id.*

200. When representing multiple clients in a single matter, "consultation shall include explanation of the implications of the common representation and the advantages and risks involved." MODEL RULES, Rule 1.7(b)(2).

201. A careful reading of Rule 1.7 reveals its confusing draftsmanship. Section (a) sets forth the general rule: "A lawyer shall not represent a client if the representation of

Each model rule is followed by a comment which serves to clarify the meaning of the rule. The comment following Rule 1.7 suggests that the critical questions are "the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."<sup>202</sup> While these questions accurately identify the issues, the fallacy lies in the assumption that an attorney could objectively answer them.<sup>203</sup>

The comment also provides a test for whether a conflict will materially interfere with the lawyer's independent professional judgment. "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for [the client's consent] . . . or provide representation on the basis of the client's consent."<sup>204</sup> But the obvious question is when such a test would ever be employed.<sup>205</sup>

---

the client will be directly adverse to another client . . . ." MODEL RULES, Rule 1.7(a). Subparagraphs (1) and (2) are exceptions to the general rule and can only be read to allow the directly adverse representation, if: "(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and (2) each client consents after consultation." *Id.* The exceptions nullify the rule. If the drafters were seeking clarity, they took a circuitous route. By stating the rule in the positive, its true meaning becomes clear: A lawyer may represent directly adverse interests if he reasonably believes they are not adverse and the client consents. A restatement of the rule in this form, however, makes it much less acceptable.

Section (b) presents the same difficulties. As restated, a lawyer may represent a client if the representation materially limits the lawyer's responsibilities to another client or to a third person, or his own interests, if he reasonably believes the representation will not be adversely affected, and the client consents. Each part of the rule requires only the lawyer's subjective belief to satisfy the test.

202. MODEL RULES, Rule 1.7 comment.

203. The attorney may not even be competent to determine the possible impairment of his judgment. To do so, the attorney would first have to decide 'objectively' what would be the optimal legal course for each client. Only *after* concluding this analysis could the attorney determine whether the clients' interests are incompatible and the representations therefore inadequate. Yet these very assessments are likely to be tainted by the compromising pressures of the conflicting interests.

See DEVELOPMENTS, *supra* note 10, at 1304-05 (1981).

204. MODEL RULES, Rule 1.7 comment. The assumption behind the exception to Rule 1.7(b) seems to be that an attorney can, when faced with a conflict of interest, treat each client equally and ignore his own loyalties or unconscious desires to favor a particularly important client over a less favored client. This requires that the attorney, without disclosing any client confidences, offer fair alternatives or courses of action to each client, while at the same time urging solutions that are in the best interests of both. Such an expectation defies reality.

205. Unfortunately, the test will be applied only in hindsight, after the client has been improperly represented and a complaint has been filed with a disciplinary committee.

Rule 1.7, like the Code, has left the ultimate decision of representation with the attorney, subject only to the unenlightened consent of the client. It goes no further than the test of Disciplinary Rule 5-105(C) which required that it be "obvious that he can adequately represent" the client. The problem presented cannot be resolved by changing the language from "obvious" to "reasonably believes." The answer lies only in a requirement of independent counsel.

The Model Rules adopt a situation approach to conflicts of interest. They provide for different levels of representation depending upon the function of the attorney.<sup>206</sup> Dual representation in litigation would be prohibited only in those circumstances in which the rights and obligations of the litigants were formally adverse.<sup>207</sup> "[A] lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them."<sup>208</sup>

Of primary importance to the issue of dual representation is the recognition in the Model Rules of the attorney in his role as intermediary.<sup>209</sup> One form of intermediation includes common representation where the clients' interests are substantially though not entirely compatible.<sup>210</sup> According to the Model Rules, if the conditions of Rule 2.2 can be met,<sup>211</sup> a common representation is possible. The policy supporting this dual representation is to avoid "the possibility in some situations of incurring additional cost, complication or even litigation."<sup>212</sup> The provisions of Rule 2.2 are similar to those re-

---

206. See Rules governing counselor as advisor, intermediary and advocate. MODEL RULES, Rules 2.1, 2.2, 3.1-3.9.

207. See MODEL RULES, Rule 1.7 comment, Conflicts in Litigation.

208. See MODEL RULES, Rule 1.7 comment, Other Conflict Situations.

209. MODEL RULES, Rule 2.2.

210. *Id.* at comment.

211. *Id.* But see *supra* note 11 and accompanying text.

212. MODEL RULES, Rule 2.2 comment. Rule 2.2 reads as follows:

- (a) A lawyer may act as intermediary between clients if:
  - (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
  - (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

quired by Rule 1.7 and Disciplinary Rules 5-105(A),(B) and (C). Each has its disclosure<sup>213</sup> and consent conditions while leaving it to the attorney to decide if he can act impartially and without prejudice to each client.<sup>214</sup> The disclosure in Rule 2.2(b) requires that it be clear to all clients that the lawyer's role as intermediary is not to be confused with the usual partisanship of independent counsel.<sup>215</sup> According to the rule, "[w]here the lawyer is intermediary, the clients ordinarily . . . assume greater responsibility for decisions than when each client is independently represented."<sup>216</sup>

The Model Rules acknowledge the obvious difficulty of keeping each client adequately informed while, at the same time, maintaining the confidentiality of the parties. "Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper."<sup>217</sup> This would presumably preclude dual representation where one client has a long-standing relationship with the attorney.<sup>218</sup>

Rule 1.8, entitled "Conflict of Interest: Prohibited Transactions," enumerates the different prohibited transactions that involve conflict of interest *per se*. Only two are relevant to the subject of this comment. The first<sup>219</sup> forbids a lawyer from entering into a business, financial or property transaction with a client unless the transaction is fair and reasonable to the client.<sup>220</sup> This is essentially a restate-

---

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

*Id.*

213. In the Model Rules, the term "disclosure" has been replaced by "consultation" in the Model Rule "Terminology."

214. See *supra* notes 7, 8 and accompanying text.

215. See MODEL RULES, Consultation in comment following Rule 2.2.

216. *Id.*

217. See MODEL RULES, Rule 2.2 comment, Confidentiality and Privilege.

218. "[A] lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and the one to whom the lawyer has only recently been introduced." *Id.*

219. MODEL RULES, Rule 1.8(a).

220. *Id.*

ment of the principle set forth in Disciplinary Rule 5-101(A).<sup>221</sup> Because of the intrinsic unfairness, the exception requires that the lawyer establish the equitable nature of the transaction to the client, who shall be given a reasonable opportunity to seek the advice of independent counsel. The second prohibited transaction<sup>222</sup> discourages a lawyer from accepting compensation for representation of a client from one other than the client unless the client consents after consultation.<sup>223</sup> This provision is substantially similar to Disciplinary Rule 5-107(A)(1).<sup>224</sup>

A comparison of the Model Rules with the Code reveals that the Model Rules represent a more permissive philosophy in respect to conflicts of interest. This is apparent in a comment to Rule 1.7 which states: "A possible conflict does not itself preclude the representation."<sup>225</sup> There are also some obvious ambiguities. For instance, the statement that "[c]ommon representation does not diminish the rights of each client in the client-lawyer relationship"<sup>226</sup> is inconsistent with the statement "the lawyer's role is not that of partisanship normally expected in other circumstances."<sup>227</sup> The Model Rules are basically a consolidation of the principles already articulated in the Code. With the exception of minor changes in terminology and format, they do little to expose the unfairness of dual representation for parties in real estate transactions.

## VI. PROPOSALS FOR REFORM

The potential for legal problems is present in every real estate transaction.<sup>228</sup> Beginning with initial negotiations leading to contract of sale, and continuing through financing, title search, drafting of documents, closing and the issuance of title insurance policies, the necessity for separate legal representation should be obvious.<sup>229</sup> For many, "the purchase of a house may be the most important legal and

---

221. See *supra* note 77 and accompanying text.

222. MODEL RULES, Rule 1.8(f).

223. *Id.*

224. See *supra* note 107.

225. MODEL RULES, Rule 1.7 comment, Loyalty to a Client.

226. *Id.* Rule 2.2 comment, Withdrawal.

227. *Id.* Rule 2.2 comment, Consultation.

228. Blair, *The Small Real Estate Transaction—What Should We Do About It?* 7 LAW NOTES 77, 78 (1971).

229. The ABA's Special Committee on Residential Real Estate Transactions spelled out in detail the services needed in the purchase of a home. See *supra* note 12.

financial transaction of a lifetime.”<sup>230</sup> The complexity of the transaction and the need for an attorney would be admitted readily by most buyers and sellers.<sup>231</sup> Yet often,<sup>232</sup> in order to save a few dollars, or because they are naive, many buyers and sellers consent to dual representation. It is not surprising that some will “leap at the opportunity to avoid a purportedly unnecessary extra expense when they are misled into believing that the . . . [other party’s] attorney can and will give them equally effective representation for free or at a lesser cost than if they obtained their own representation.”<sup>233</sup> Since dual representation is currently permissible, there remain only two ways to overcome the resulting injustice: Educate the public as to the pitfalls of dual representation, and enact legislation prohibiting it.

#### A. *Educating the Public*

Efforts to enlighten consumers on the need for independent representation have not been successful.<sup>234</sup> Most buyers and sellers have had little or no contact with an attorney in the past. The thought of choosing one and the expectation of exorbitant legal fees are factors that may discourage the retention of an attorney. In addition, most information that the consumer receives is from other lay people or from those who would have a financial stake in the outcome. Any successful consumer education program must provide an unbiased perspective that points out all the legal and financial ramifications of the real estate transaction.

---

230. *Id.* at 9. Recent economic reports indicate that the average cost of a new home is \$91,100. *New Haven Register*, Aug. 31, 1982 at 1, Col. 1.

231. Some complexity is associated with the latest creative mortgage financing brought on by the double-digit interest rates. What once was a simple conventional mortgage with equal monthly payments has turned into a hodgepodge of variable arrangements, the ramifications of which would confuse even the most sophisticated borrower. Similarly, a problem created by the tight mortgage market is the assessment of discount points to a seller by the lenders. Some lenders will not lend at interest rates below the market, and “[s]ince they cannot collect loan discount points from FHA-VA borrowers, they collect such points from sellers.” Stoppello, *supra* note 184, at 396. When a seller agrees to a certain mortgage contingency in a sales contract, he had better know the possible consequences.

232. *See* Survey, *supra* note 1.

233. *In re Dolan*, 76 N.J. 1, 19, 384 A.2d 1076, 1085 (1978) (Pashman, J., concurring & dissenting).

234. “Because of his lack of knowledge of the market and the services involved, the buyer is an easy mark for ‘steering’ by the broker or lender.” Whitman, *supra* note 74, at 1339.

## 1. Amending RESPA

Congress sought to stimulate intelligent choices for borrowers when it made the dissemination of information booklets a condition of RESPA.<sup>235</sup> Unfortunately, by tying it to the mortgage application process, it restricted the booklet's effectiveness.<sup>236</sup> The need for legal representation at the precontract stage was ignored by Congress, although it was told that such representation was required if the parties were to receive proper protection.<sup>237</sup> By selecting the lender, with its necessary federal connections as the disbursing of disclosure materials, Congress intended to avoid a possible jurisdictional challenge. But, in *Goldfarb v. Virginia State Bar*,<sup>238</sup> the separate aspects of a home purchase were taken together to form a sufficient connection with interstate commerce to support federal jurisdiction. As a result of this Supreme Court decision, there can be little doubt today that any settlement service provider would come under the regulation of RESPA. Congress, therefore, should amend RESPA to provide for the dissemination of information booklets to buyers and sellers before they legally bind themselves.<sup>239</sup> The booklets could be issued by brokers who are used in over ninety percent of all real estate sales,<sup>240</sup> or by builders<sup>241</sup> if they do not use the services of an agent.<sup>242</sup> This would ensure that buyers and sellers would have information about the settlement process before they committed themselves in writing. To be certain that the booklets are distributed in a timely manner, the sales contracts utilized by both brokers and builders should contain a warning in bold print similar to the following:

**WARNING: THIS CONTRACT AFFECTS THE LEGAL RIGHTS AND RESPONSIBILITIES OF THE PARTIES WHO SIGN IT. No person should affix his signature to this document**

---

235. See *supra* notes 159, 164-168 and accompanying texts.

236. See *supra* note 168.

237. Usually, the homebuyer will be given a standard form sales contract to sign. Drafted by the local bar association or real estate board, it is likely to be seller oriented. "Since there is no one in the picture who represents the homebuyer's interests, he will have no independent advice as to whether the contract adequately protects him unless he obtains his own counsel before signing." Stoppello, *supra* note 184, at 427.

238. 421 U.S. 773 (1975).

239. This was the recommendation suggested by Ms. Stoppello. See Stoppello, *supra* note 184, at 436.

240. *Id.* at 435.

241. *Id.* at 442. As pointed out in the Stoppello article, the builders' activities also substantially affect interstate commerce. *Id.* at 441 n.250.

242. *Id.* at 442.



until he has read and understood the contents of an information booklet approved by HUD which must be provided in accordance with Section 5 of the Real Estate Settlement Procedures Act. 12 U.S.C. § 2604(a) 1983. Failure of the Seller or his agent to provide such a booklet is punishable by a penalty of not more than one thousand dollars (\$1,000), or imprisonment for not more than six (6) months, or both, in the discretion of the court.

HUD has recognized the need to get settlement information into the hands of consumers earlier. To effectuate this goal, the agency prepared a consumer booklet called *Don't Forget Those Settlement Costs* which is to be disseminated widely through public service advertising.<sup>243</sup>

## 2. Bar Associations

The ABA's pamphlet entitled *Residential Real Estate Transactions: The Lawyer's Proper Role—Services—Compensation*<sup>244</sup> raises critical issues which should not be ignored by Congress and HUD when they move to amend RESPA. The ABA should make every effort to encourage its members and those of state and local bar associations to adopt the principles contained in its pamphlet. Only when the bar truly acknowledges the injustice of dual representation can an honest effort to educate the public go forward.

## 3. Legal Fees

Most resistance to independent counsel is tied to the consumer's belief that legal fees are too high or unjustified. Studies show, however, that fees paid to attorneys represent only a small percentage of the overall charges assessed during settlement.<sup>245</sup> The largest share of settlement costs are paid to real estate brokers<sup>246</sup> whose commissions have come to be accepted as necessary. Although brokers are usually paid by sellers, economic theory demonstrates that all transaction costs are ultimately passed on to buyers. Since the price of real estate has skyrocketed during the last decade, attempts to limit the services provided by attorneys are not justified. With so much at stake financially for the consumer, the full representation by an at-

---

243. See P. BARRON, FEDERAL REGULATION OF REAL ESTATE, THE REAL ESTATE SETTLEMENT PROCEDURES ACT 2-17 n.68 (Cum. Supp. 2, 1981).

244. See *supra* note 12.

245. See Legislative History of P.L. 93-533 (RESPA) U.S. CODE CONG. & ADM. NEWS 6563 (1974).

246. *Id.*

torney is needed more now than before.<sup>247</sup>

The largest share of legal fees is for services connected with the assurance of title.<sup>248</sup> In order to avoid duplication of effort and legal fees, lenders should be encouraged to accept the title report provided by the buyer's attorney. This would eliminate the need for two searches of title and excess fees.<sup>249</sup> Also, a builder should be prohibited from paying for his buyer's legal fees. Although it sounds like a good deal for the buyer, such a practice encourages dual representation and other inequitable arrangements. Moreover, it saves nothing for the homebuyer who ultimately assumes the expense as part of the purchase price.

Other legal expenses usually include the drafting of sales contracts, deeds and mortgages, and representation at closing. These costs should be apportioned between buyer and seller. The buyer could pay for the cost of his mortgage documents and the seller for his deed of conveyance and the necessary releases of liens. The preparation of a sales contract could be the expense of both buyer and seller and each should have his own attorney participate in its formation. Separate counsel is essential at closing in order to provide the unbiased advice that is necessary. This, more than any other service, is at the heart of legal representation. Compared to other expenses of settlement, independent representation "is a cost that most purchasers would willingly bear if they were aware of its potentially significant benefit."<sup>250</sup>

#### 4. Availability of Counsel

Currently, many consumers relinquish their choice of an attorney because they lack sufficient information to make an intelligent selection. To assist the public in obtaining legal services, lawyers could be certified as specialists in accordance with procedures in the state where they are licensed to practice.<sup>251</sup> The state and local bar

---

247. See *supra* note 230.

248. See an earlier draft of the ABA position paper entitled: Final Draft The Proper Role of the Lawyer in Residential Real Estate Transactions and Appropriate Methods of Compensating Him for His Services, 19 (1974) *supra* note 12.

249. If the buyer's attorney makes the examination, he can provide advice to his client while giving formal title protection to the lender. Since he does not have to provide advice and representation to the lender, no conflict of interest arises. *Id.*

250. *In re Dolan*, 76 N.J. 1, 19, 384 A.2d 1076, 1085 (1978) (Pashman, J., concurring & dissenting).

251. Several states have already established certification plans whereby a lawyer may be certified as a specialist or expert in a given field by appropriate state authority. See *Brady v. State Bar*, 533 F.2d 502 (9th Cir. 1976); *In re Amendment to Integ. Rule*,

associations could then make available, upon request, a list of attorneys specializing in real estate<sup>252</sup> as well as "the basis on which the lawyer's fees are determined, including prices for specific services . . . payment and credit arrangements; a lawyer's foreign language ability; [and] names of references. . . ." <sup>253</sup> Bar associations would be required to submit the entire list of names to the requesting party. This would avoid the customary referral arrangements of brokers, builders and lenders that work against a competitive market.

### B. *Legislative Reform*

This comment has shown that real estate practice in New England and on the eastern seaboard has been quite unsatisfactory. Many consumers are not receiving the conflict-free representation that they deserve. An important societal interest would be served by requiring that lawyers give to clients their undivided loyalty in real estate transactions.

Neither the Code nor the Model Rules have dealt effectively with the problem of dual representation. Since closing practices throughout the country are so diverse, new legislation on the federal level to correct the problem, although encouraged by this writer, is unlikely at this time. Adoption of the following proposed statute, which prohibits dual representation, would provide a necessary step in fulfilling the expectations of the public and in maintaining the integrity of the bar.

## PROPOSED ACT

### Short Title: REAL ESTATE CONFLICT OF INTEREST REFORM ACT

It is the purpose of this Act to protect the consumer by eliminating the self-serving conflict of interest situations that exist among lenders, land developers, builders, real estate brokers, title insurance companies and attorneys who provide settlement services in real estate transactions.

#### *Section 1 Terminology*

A. For purposes of this act, the term "settlement services" includes:

- (1) preparation or review of all documents incident to the sale, lease or mortgage of real estate, including but not limited to:

---

399 So.2d 1385 (Fla. 1981); CONN. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105A, CONN. PRACTICE BOOK 18.1 (Oct. 1982).

252. See MODEL RULES, Rule 7.4(c).

253. *Id.* Rule 7.2 comment.

- a. boundary line agreement;
  - b. certificate of title or other title report;
  - c. condominium documents;
  - d. contract of sale or assignment of contract of sale;
  - e. deed of conveyance;
  - f. escrow agreement;
  - g. financing statement and related security agreement as it relates to real property;
  - h. joint venture agreement as it relates to real property;
  - i. lease or assignment of lease;
  - j. modification, assignment or assumption of mortgage note or deed;
  - k. mortgage note and deed and related papers;
  - l. settlement statement;
  - m. survey.
- (2) search and examination of title records;
  - (3) representation of and advice to a buyer or seller at execution or assignment of contract of sale;
  - (4) representation of and advice to a lessor or lessee at execution or assignment of lease;
  - (5) representation of and advice to a buyer, seller, borrower or lender at the settlement of a loan or the transfer of real estate, including the disbursement of funds and the delivery and recordation of documents.

B. For purposes of this Act, the term "title insurance company" includes: a company, agency or agent that passes upon and makes title insurance underwriting decisions on title risks, including the issuance of title insurance policies, binders and endorsements, and that maintains a separate and distinct staff and office or offices for such purposes.

### *Section 2 Prohibitions*

A. No attorney shall charge any person who is a seller, buyer, borrower, lender, lessor, lessee, broker or contracting party for settlement services incidental to or part of a real estate transaction, unless such person has personally retained such attorney and such attorney represents only the interests of such person in connection with such real estate transaction.

B. No attorney who performs any settlement services which are incident to or part of any real estate transaction shall represent the interests of more than one party, including his own interests insofar as he is a buyer, seller, borrower, lender, lessor, lessee, broker or contracting party, even if the services are performed free of charge or paid for by some other person having an interest in the transaction.

C. Nothing in Sections (A) or (B) shall be construed as preventing an attorney, while acting for a borrower only, from preparing, explaining or supervising the execution of mortgage documents or related papers as part of the settlement services which are incident to or part of a real estate transaction, or from charging said borrower for the reasonable expenses of said services. In such event, said attorney shall be acting exclusively for said borrower and not for the lender.

D. No attorney who performs any settlement services which are incident to or a part of any real estate transaction for a buyer, seller, borrower, lender, lessor, lessee, broker or other contracting party shall receive directly or indirectly from any title insurance company any commission, rebate, dividend, share of stock, discount, abatement, credit or reduction of premium, or other payment in connection with the issuance or procurement of a title insurance policy on the real estate which is the subject of said transaction. This prohibition shall apply whether the commission, rebate, dividend, share of stock, discount, abatement, credit or reduction of premium or other payment is received immediately or at a later date and whether the premium charged by the title insurance company in connection with the issuance of the policy is paid for by the insured or by any other person having an interest in the transaction. Nothing herein contained shall be construed as preventing the receipt of a commission, rebate, dividend, share of stock or other payment by a regular full-time employee of the title insurance company.

E. Notwithstanding any provision of this Act, an attorney who performs a title search as part of the settlement services which are incident to or part of the real estate transaction for a buyer, seller, borrower, lender, lessor, lessee or other contracting party, shall not be prevented from issuing a title report to a title insurance company or from charging a buyer, seller, borrower, lender, lessee or lessor or other contracting party for the reasonable expense of preparation of said report. In such event, the attorney shall be acting exclusively for said buyer, seller, borrower, lender, lessor, lessee or other contracting party and not for the title insurance company. The attorney's duty to the title insurance company shall be limited to the accuracy of those matters stated in the opinion of title.

F. Any attorney or entity violating the provisions of this Act shall be guilty of a misdemeanor and subject to a fine or not more than one thousand dollars (\$1,000), or imprisonment for not more

than six (6) months, or both, in the discretion of the court.<sup>254</sup>

## VII. CONCLUSION

The proposals suggested herein are focused exclusively on removing the inequities created by dual representation. No effort has been made to deal with abuses that are outside the purview of the legal services connected with real estate transactions. Recognition by the bar of the problem of dual representation and a desire to eliminate it have been largely nonexistent. The Model Rules, as approved by the American Bar Association, do not indicate a positive change for the consumer of real estate legal services.<sup>255</sup>

It is hoped that the proposed reform measures will result in a more equitable and realistic approach to professional responsibility. While some of the suggestions are new, a few represent a composite of other people's proposals. The pitfalls of dual representation have been exposed many times; yet, the public remains unprotected. It is time to give this problem serious consideration. The time for action is long overdue.

*Gail S. Shaulys*

---

254. Portions of this statute have been adopted from the Real Estate Settlement and Escrow Act of 1973, H.R. 12066, *supra* note 177; the Real Estate Settlement Cost Reform Act of 1972, H.R. 13337, *supra* note 151; N.J. STAT. ANN. § 46B-34 (West Supp. 1981-1982); and N.C. GEN. STAT. § 58-135.1 (1975).

255. Today in England, as the result of the adoption of the Solicitor Practice Rules of 1972, the buyer and the vendor must be represented by different attorneys. The new rule was forced on the Law Society by the Lord Chancellor, acting in conformity with what appeared to be a mandate from the courts. . . . Under the new English Rule the mortgagee may employ an independent solicitor or may use the buyer's solicitor. . . . Under current practice rules a builder may not successfully offer a 'package deal' whereby the builder's solicitor does all the legal work.

Payne, *supra* note 145, at 370-71, n.123 (citations omitted). See also H. KIRK, PORTRAIT OF A PROFESSION 152 (1976).